Supreme Court, U.S.

00 1944 MAY 29 2001

No.

IN THE
SUPREME COURT OF THE UNITED STATES

DALE FURBY,

Petitioner,

v.

CHRYSLER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GREGORY T. ZALECKI
Counsel of Record
ZALECKI AND BAIR, P. C.
12900 HALL RD., SUITE 415
STERLING HEIGHTS, MI 48313
(810) 254-6113

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether summary judgment pursuant to FRCP 56 may be granted on grounds not advanced by the moving party.

2. Whether a summary judgment granted pursuant to FRCP 56, based upon a mistaken factual assumption, should be set aside by this Court.

3. Whether Furby was entitled to relief under the Michigan Bullard-Plawecki Employee Right to Know Act for uncontroverted false statements causing his December 6, 1996 termination.

PARTIES TO THE PROCEEDINGS

Petitioner

Dale Furby

Respondent

Respondent, Chrysler Corporation, has been merged with and into DaimlerChrysler Corporation. DaimlerChrysler Corporation is a wholly-owned subsidiary of DaimlerChrysler North American Holding Corporation, which is a wholly-owned subsidiary of DaimlerChrysler AG, a German stock Corporation, whose stock is publicly traded.

Other Parties

Al White, Oliver Coleman, Bill Kennedy and Frank Pitonyak were parties to the proceedings below and have no interest in the outcome of the petition.

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STATEMENT OF OPINIONS BELOW

None of the opinions and orders entered in this case have been published. Attached as Appendix A is the January 30, 2001 unpublished decision of the United States Court of Appeals for The Sixth Circuit. The appendix also contains copies of other unreported decisions and orders relating to this case.

STATEMENT OF JURISDICTIONAL BASIS

The United States Court of Appeals for the Sixth Circuit issued its opinion on January 30, 2001. On February 13, 2001 Petitioner filed a petition for rehearing which the United States Court of Appeals denied on February 28, 2001. This Petition for Writ of Certiorari is filed within 90 days of the denial of the petition for rehearing. The Court's jurisdiction is invoked pursuant to 28 USC § 1254(1) and 28 USC § 2106.

STATUTES AND COURT RULES INVOLVED

U.S. Federal Rules of Civil Procedure
Rule 56 Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor
upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without

supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is

competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

This is an action by an employee against his employer

involving several state tort actions. Petitioner, Dale Furby, initially filed a defamation suit in state court. The defendants removed this suit to federal court on the basis that the suit involved a federal question. Furby had sought to obtain reentry into the Chrysler skilled trades program. Entry into the Chrysler skilled trades program was governed by a collective bargaining agreement and subject to the Labor Management Relations Act. (See fn. 5 of Court of Appeals decision, Appendix A, p. 8a).

While the case was pending in the federal court, Furby filed an amended complaint containing four counts (Apx. F, p36a). The first count stated a cause of action based upon common-law defamation. The second count stated a cause of action based upon retaliation pursuant to MCL 37.1602 and MCL 37.2701. The third count stated a cause of action for expungement of false information contained within employment records pursuant to MCL 423.501 et seq. The fourth count stated a cause of action based upon the maintenance of a policy of handicap discrimination prohibited by MCL 37.1101 et seq.

In 1991 Furby had been removed from the Chrysler skilled trades program. Such a removal was a very rare occurrence within Chrysler. The ostensible reason for the removal was Furby's inadequate performance on the job. Furby, contended, however that he was removed because Chrysler perceived him to have a mental disability or, in the alternative, that he may have had such a disability, but it did not interfere with his ability to perform his job. See Count IV of Furby's first amended complaint appearing at Appendix F, page 36a. Furby proceeded to obtain multiple college associate degrees and certificates in various skilled trades in order to requalify for the skilled trades program. See paragraphs 67 and 93 of his summary judgment affidavit. Appendix H.

Before trial the court granted summary judgment as to

count IV, Policy of Discrimination, on the basis that plaintiff had failed to state a viable cause of action under the Michigan Handicapper's Civil Rights Act (Apx. D, p 25a). A bench trial was conducted on the remaining three counts. After the trial judgment was entered in favor of the defendants (Apx. B, p 22a).

Furby's amended complaint addressed a number of incidents occurring during the course of his employment with Chrysler Corporation. For purposes of this petition only those incidents pertaining to count IV, Policy of Discrimination, and the termination of his employment during December, 1996 are addressed.

During December, 1996 Dale Furby's job with Chrysler Corporation was terminated. Chrysler had alleged that he was five minutes late reporting to the line; left his workstation; and refused to follow a supervisor's instructions. During the trial only one witness to the incident testified. That was the Plaintiff, Dale Furby. Chrysler had called no witnesses who had personal knowledge regarding the incident leading up to the termination of Mr. Furby's employment. Mr. Furby's testimony can be found at trial transcript volume 2, pp. 106 -- 118, 132, Apx. I, p. 80a.

Mr. Furby's testimony can be summarized as follows:

His supervisor was a recent successor to his prior supervisor, Mr. Morosky. On the day of the incident Mr. Furby was a press operator. Trial transcript volume 2, page 106. Furby had a preassigned job that he was supposed to be working that day. Someone else appeared at the job site to work the job that Furby thought he was assigned to. Furby then proceeded to try to locate his supervisor. When he did locate his supervisor, he was accused of being late. Trial transcript volume 2, page 107. Furby then asked to talk to his union steward. Trial transcript volume 2, page 108. Furby came into work approximately five minutes before the start of his shift on

the day of the incident. Trial transcript volume 2, page 109. He did not report late to the line that day. Trial transcript volume 2, page 113. Again, these transcript excerpts can be found at Appendix I.

The major complaint which the supervisor had regarding Furby was that he was late. Although Furby actually had a face-to-face meeting with the supervisor within six minutes of the start of the shift, Chrysler terminated his employment for 10 months. It appeared to Furby that the allegation that he failed to follow instructions referred to the mistaken fact that he was not at his pre-designated job location at the beginning of the shift. Trial transcript volume 2, page 111.

Furby was accused of leaving his workstation. He testified that he left the workstation because he was informed that he was suspended. He did not leave the workstation before he was told that he was suspended. Trial transcript volume 2, pp. 112, 113.

After the incident and during December, 1996 Furby was told that he had to sign a conditional reinstatement agreement in order to get his job back. He refused to sign this agreement because the allegations of wrongdoing were false. Trial transcript volume 2, pp. 115 -- 116.

As a result of this job termination Furby lost wages in the approximate amount of $40,000.00. Trial transcript volume 2, page 132. He lost an $8,000.00 profit sharing check for 1996 because he was not actively working on December 30, 1996. He lost a profit sharing check in the amount of $7,375 because he did not come back to work at Chrysler until September, 1997. Trial transcript volume 2, pp. 116 -- 117. He lost 1997 holiday pay in the amount of $625. Trial transcript volume 2, page 117. He also lost his medical insurance during the time that he had no job. Trial transcript volume 2, page 118.

At the trial Chrysler presented no evidence or testimony contradicting Furby's testimony regarding the December 1996

job termination. The trial court never indicated that it disbelieved Furby regarding this incident. Yet, judgment was entered against him. The Court of Appeals erroneously determined that the trial court had made fact findings against Furby with respect to this termination and affirmed that portion of the trial court decision on the basis of an inability to conclude that the phantom fact findings were clearly erroneous.

Furby had argued that summary judgment pursuant to FRCP 56 can only be granted for reasons stated within Chrysler's motion. Those reasons appear within Appendix which G, p. 49a. Chrysler's request for dismissal of Count IV was based upon the grounds of res judicata, collateral estoppel and the statute of limitations. The trial court went beyond these grounds and determined that Furby had failed to state a cause of action. The Court of Appeals agreed that this was not an appropriate ground for the granting of summary judgment, but went on to affirm the grant of summary judgment on an entirely new ground. The Court of Appeals determined that Furby had not provided factual support to prove a prima facie case. Appendixes 16a. The appellate court determined that Furby had provided no proof that he suffered an adverse employment action. In other words, he had not communicated his desire to be readmitted into the Chrysler skilled trades program to anyone. The problem with this reasoning is that it adds a new ground for granting summary judgment, which had not been requested by Chrysler nor defended by Furby, and ignores paragraph 93 of Furby's uncontroverted summary judgment affidavit appearing at appendix page 77a.

REASONS FOR GRANTING THE WRIT

SUMMARY JUDGMENT WAS IMPROPERLY GRANTED

Chrysler alleged that it was entitled to summary judgment as to Count IV on the basis of res judicata, collateral estoppel and the statute of limitations. See Appendix G. The

trial court dismissed Count IV on the basis that Furby had failed to state a claim upon which relief could be granted. The Court of Appeals refused to affirm the summary judgment on this basis. However, the Court of Appeals compounded the lack of notice to the Plaintiff problem by affirming the summary judgment on a new ground. The Court of Appeals held that Furby had failed to establish a prima facie case because he had not presented evidence indicating that he suffered an adverse employment action.

The Court of Appeals stated that Furby failed to allege even one specific instance in which he sought reentry into the apprenticeship program. Appendix A, page 18. Not only does this approach add a new ground, it is factually inaccurate. Furby had submitted an affidavit in response to Chrysler's motion for summary judgment. Appendix H. in paragraph 93 of his affidavit (page 77a) Furby states:

> I have continuously sought reentry into the Chrysler skilled trades program since I was removed. These requests include the following:
>
> e) I filed the civil rights complaints contained within exhibit 11.
>
> f) I took preapprentice tests through Chrysler during the fall of 1992 and the summer of 1995. I was told that I scored the highest within the plant on spatial relations.
>
> g) I filed a written application with Chrysler for a skilled trades apprenticeship during November 1992. It remains on file to the best my knowledge.
>
> h) I appealed my removal from the apprenticeship to the National Apprenticeship Committee.
>
> i) I sent letters requesting readmission into the skilled trades program to apprentice representative Chris Caplanis (1994), skilled trades committeeman Bill Aleck (1994),

national apprentice committee member and chief steward for the skilled trades bob Barsoti (1994), national apprentice committee member Ron Gosset (1994), national apprentice committee member (Chrysler) Russ Bayly (11/93), national apprentice committee member Mary Ann Morrill (in charge of the apprentice program at Chrysler headquarters - 11/93), international representative Stephen Jones (9/95), Chrysler chairman Robert Eaton (11/93), local union president John Dansky (1994), international representative Larry Leach (1994), local 869 president Carl Dickerson (1994), and the vice president of the UAW international union Stan Marshall (1993)

j) I called Mary Ann Morrill at least two dozen times from 6/21/91 to the time of her death believed to be after 1993. I also called her supervisor Mr. Arthur in 1994 or 1995.

k) I called Russ Bayly several times in 1993 and 1994.

l) I called Ron Gosset many times.

m) I called the Chrysler National Training Center (they taught the preapprenticeship training classes) many times in 1993 and 1994.

n) In 1995 I called Terry McEnvoy who was in charge of the skilled trades education program.

Thus it would be clearly improper to affirm summary judgment on the basis that Furby never sought reentry into the Chrysler skilled trades program.

The grounds upon which the trial court granted summary judgment and upon which the Court of Appeals affirmed summary judgment are not stated within Chrysler's motion for summary judgment. Appendix G. FRCP 56

provides ten days notice to a party facing a motion for summary judgment. Furby never received this notice with respect to the actual grounds used to support summary judgment. Further, the law is fairly clear that it is improper to grant summary judgment on grounds not advanced by the moving party and without giving the non-moving party an opportunity to respond. *Routman* v. *Automatic Data Processing, Inc.*, 873 F.2d 970, 971 (6th Cir. 1989) and *Brobst* v. *Columbus Servs., Int'l*, 761 F.2d 148, 154 (3rd Cir. 1985).

The Court of Appeals failed to evaluate evidence in a light most favorable to the non-moving party. It is impossible to reconcile the facts used by the Court of Appeals, with respect to the counts at issue here, with Furby's extensive affidavit. The Court of Appeals ignored the extraordinary steps taken by Furby to improve his qualifications for the skilled trades – i.e. the attainment of multiple college degrees and college skilled trades certificates.

Count IV should be reinstated. FRCP 56 was not followed. The Court of Appeals interpreted the evidence in a light most favorable to the moving, rather than the nonmoving, party. The grounds on which summary judgment was ultimately granted where never presented by Chrysler. The new grounds discovered by the Court of Appeals to affirm summary judgment are contradicted by Furby's summary judgment affidavit.

FURBY WAS ENTITLED TO RELIEF UNDER THE BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT FOR FALSE STATEMENTS CAUSING HIS DECEMBER 6, 1996 TERMINATION

STANDARD OF REVIEW

The clearly erroneous standard applies to this court's review of District Court findings of fact. *United States Department of Labor* vs. *Cole Enter., Inc.*, 62 F.3d 775, 778 (C.A. 6, 1995). A finding is clearly erroneous "only when,

although there may be some evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Johnson* vs. *Jones*, 149 F.3d 494, 499 (C.A. 6,1998). De novo review is applied to conclusions of law. See *United States Department Of Labor*, *supra*. Issues involving statutory interpretation are deemed to be questions of law subject to de novo review. *United States* vs. *Kassouf*, 144 F.3d 952, 955 (C.A. 6,1998).

One of the claims that Furby brought pursuant to the Bullard-Plawecki Employee Right to Know Act ("BPERKA") related to his December 6, 1996 employment termination. He alleged that he was terminated from his employment during December, 1996 as a result of false information that was contained within his personnel record. He alleged that he was falsely accused of reporting late to the line and leaving his workstation. He sought expungement of the false information from his employment record and damages caused by the false information pursuant to the BPERKA.

The state of Michigan has a statute known as the Bullard-Plawecki Employee Right to Know Act. MCL 423.501 et seq. This law prohibits an employer from placing false information within an employee's of personnel record. MCL 423.505 provides in part "... If either the employer or employee knowingly places in the personnel record information which is false, then the employer or employee, whichever is appropriate, shall have remedy through legal action to have that information expunged." The word "knowingly" modifies the verb "places," not the word "false." Thus an employee is entitled to relief if his personnel record contains false information without regard to whether or not the information was known to be false when it was placed within the personnel record.

MCL 423.511 provides the following remedy: "If an employer violates this act, an employee may commence an action in the Circuit Court to compel compliance with this act.

... **in addition**, the court shall award an employee prevailing in an action pursuant to this act the following damages: (a) For a violation of this act, **actual damages** plus costs. (b) for a willful and knowing violation of this act, $200.00 plus costs, reasonable attorney's fees, and **actual damages** (emphasis supplied)." Note that actual damages are recoverable for both violations of the act and "willful and knowing" violations of the act. Thus it would appear that an employer would be liable under this act even if it unknowingly placed false information within an employee's personnel record. Since Furby's damages directly flowed from the false information contained within his personnel records, Furby is entitled to damages. The statute specifically allows actual damages **in addition to** compelling compliance with the act.

The trial judge denied relief for this claim. The essence of his decision can be found at trial transcript volume 5, p. 66. The Court stated:

> "I think the way to challenge it is through the grievance procedure. That's what we have that all set up for. Not to come into court and start challenging this. And I say that in this respect.
>
> If I were satisfied that this was clearly a false statement, that Chrysler knowingly put it in their own -- had good reason to know that it was false and nevertheless placed it in his records, then I think maybe relief under the Bullard-Plawecki act is

> appropriate. This is not a false record.
>
> It is true that the information that Mr. Gillenwater gave to Mr. Dyckman may be incorrect, based on Mr. Furby's recollection of what took place. That may be incorrect in that sense, but it's not in my judgment the type of record that is false and is intended to be expunged. As I say, the proper procedure is that what you have the grievance procedure for."

In essence the trial judge determined 1) that Furby was not entitled to relief unless the person placing the record into his personnel file knew that it was false; and 2) the records in question were not of the type intended to be expunged. These were conclusions of law which are reviewed de novo. Since it appears that no published case has addressed these questions, Furby is relying upon the wording of the statutes to support his position.

Unfortunately, the grievance procedure does not provide an adequate remedy. Furby was required to either sign the conditional reinstatement agreement (which contained false allegations of wrongdoing) or to give up his job and await the outcome of an arbitration hearing. He initially stood on his principles and refused to sign the conditional reinstatement agreement because it contained the false statements. After waiting 10 months for an arbitration hearing he was compelled for economic reasons to sign the conditional reinstatement agreement. Trial transcript volume 2, pp. 115 -- 116, Apx I. That agreement terminated any further grievance proceedings.

On several occasions the trial judge indicated a reluctance to permit Mr. Furby to seek a remedy under the BPERKA. He felt that an employee subject to a collective bargaining agreement should not be permitted to seek a remedy under the BPERKA, but should be limited to his remedies under the applicable grievance procedure of the collective bargaining agreement. In other words, the trial judge felt that Furby's BPERKA claim should be preempted by federal labor law. This issue was never explicitly raised. If it had been the correct ruling would be that the BPERKA is not preempted by federal labor law pursuant to *Smolarek* v *Chrysler Corp.*, 879 F.2d 1326 (C.A. 6, en banc 1989). For a more in depth analysis of this issue see Record 43, Plaintiff's Brief Regarding §301 jurisdiction. It appears to appellant that the trial judge's philosophy regarding preemption influenced his decision regarding Furby's claim that the records pertaining to his December, 1996 termination contained false information. At trial transcript volume 5, pages 21-33, Plaintiff's closing statement, the trial judge entered into a lengthy dialogue with Plaintiff's counsel regarding whether or not an employee who has false information in his personnel file may seek relief in court. At trial transcript volume 5, p. 21, the Court stated "Well, tell me, do you believe that this Act provides for court intervention, whether it be state court or federal court, any time an employee believes that there is information in his file that is not correct and which he disputes the accuracy of? A person can come directly into court and ask that that be removed and that's the intent of the act." Also see trial transcript volume 5, p. 66 lines 1-17,, quoted above (re: judge's decision). A review of these pages shows that the court would be very reluctant to grant relief even if it accepted the fact that Furby's personnel record contained false information.

Furby contended that he did nothing to warrant the termination of his job during December, 1996. He was the only

witness with knowledge of the offense to testify. His supervisor, Del Gillenwater, did not testify. Furby testified that he was on time for his job on the day of the incident and that he did not leave his workstation until he was told that he was suspended.

Defendant's trial exhibit 114 is a set of time records pertaining to Dale Furby for the year 1996. These are Chrysler records showing that time that Furby entered the plant on his work days. The records show that from February 1, 1996 until the time of his termination in December, 1996 Furby never entered the plant after the start of his shift. In other words, he always entered the plant on a timely basis. The gate entry times appear on the bottom left side of selected documents within exhibit 114. The left most column indicates the gate entry time for each day of the week.

If Chrysler's position is accepted, Furby was properly terminated for being five minutes late on December 6, 1996. Not only was such punishment not proportional to the alleged wrong, the alleged wrong was never established. Furby testified that he committed no wrongdoing on that day. The 1996 time records show Furby's pattern of always being on time for work. No one with first hand knowledge testified that Furby had ever done anything wrong during December 1996.

The only evidence of wrongdoing was the challenged records themselves. See Plaintiffs exhibit's 7A, 7B and 7C admitted at trial transcript volume 2, p. 110. Plaintiff offered these records into evidence to show the false statements which formed the basis of this BPERKA claim.

Plaintiff was not permitted to give a traditional opening statement (nor for that matter a traditional closing statement) at trial. Shortly after Furby's attorney began his opening statement the trial judge began a somewhat confrontational dialogue with him. See trial transcript volume 1, pages 3-51. It had been Furby's intention to admit into evidence all of the Chrysler

personnel records pertaining to him for the limited purpose of showing the false information which he desired to challenge. This would be done by directing the Court's attention to specific records. Trial transcript volume 1, p. 21 line 17. Instead, the court directed Plaintiff to submit excerpts of the records which particularly pointed out the alleged false information. Trial transcript volume 1, p. 21 and page 23. Plaintiff's exhibit 7 was such a record. Not only was it Plaintiff's intention to offer the excerpts of his personnel records for the limited purpose of showing that they contained false information, it also appears that the trial judge acknowledged that the records would only be used for such a purpose.

At trial transcript volume 4, pages 13 -- 15, defendants sought the admission of numerous personnel records of Furby. Plaintiff objected on the basis of hearsay. At trial transcript volume 4, p. 15, line 17, the Court stated "... I accept them as not for the truth of the matter contained therein at all. They're not being offered for that and therefore I don't receive them for the truth. I accept them as offered, and that is, as documents which affected his decision-making process. The court therefore will admit them for that purpose." This is consistent with F. R. E. 105 which states: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

Furby was the only eyewitness to the incident to testify. Exhibit 7 should not be sufficient to impeach his testimony because it should be used for the limited purposes of showing that false records existed and the basis for the labor relations supervisor's decisions. Any probative value of exhibit 7B is further diminished by the fact that it contains double hearsay. That written record contains the statements that James Dykeman says that Del Gillenwater made to him. Exhibit 7B

was admitted to show that Chrysler records contained false information about Furby. It seems illogical to conclude that the record alone constitutes sufficient proof that Furby was guilty of wrongdoing.

The trial court's decision denying relief to Furby under the BPERKA as it relates to the December 6, 1996 incident should be reversed. The trial court acknowledged that the information provided by Gillenwater to Dyckman may be incorrect. If the information was found to be accurate, such a fact-finding would be clearly erroneous. Irrespective of whether or not Dyckman had knowledge of the falsity of the statements, Gillenwater did. Since Gillenwater was a supervisor his actions are attributable to Chrysler. The trial court's conclusion that this is not the type of record to be expunged is inconsistent with the statute which provides relief whenever false information is placed within an employee's personnel record. The trial court's conclusion that relief may be available under grievance procedures does not negate the enforceability of the statute.

CONCLUSION

Petitioner requests that this Honorable Court grant his Petition for Writ of Certiorari; determine that his HCRA claim against Chrysler is not barred; reverse the decision in favor of Chrysler on the BPERKA claim as it relates to the December 1996 job termination; and grant any other relief agreeable to equity and good conscience to which Petitioner may be entitled.

Respectfully submitted,

ZALECKI AND BAIR, P. C.

/s/_____
GREGORY T. ZALECKI
Attorney for Petitioner
12900 HALL RD., SUITE 415
STERLING HEIGHTS, MI 48313
(810) 254-6113

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 99-1712

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DALE FURBY,	**FILED**
	JAN 30 2001
Plaintiff-Appellant,	LEONARD GREEN, Clerk
	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
-v-	
AL WHITE; OLIVER COLEMAN; BILL KENNEDY; CHRYSLER CORPORATION;	**OPINION**
	NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.
Defendants-Appellees,	
FRANK PITONYAK,	
Defendant.	

BEFORE: KEITH, BOGGS, COLE, Circuit Judges.

R. GUY COLE, JR., Circuit Judge. Plaintiff-Appellant Dale Furby ("Furby") appeals the district court's grant of partial summary judgment for, and its judgment upon the conclusion of a bench trial in favor of, Defendants-Appellees Al White, Oliver Coleman, Bill Kennedy, and Chrysler Corporation (collectively referred to herein as "Chrysler"). Furby assigns error to: (1) the district court's grant of Chrysler's motion for summary judgment on Count IV of his amended complaint, alleging that Chrysler maintained a policy of handicap discrimination, in violation of MICH. COMP. LAWS ANN. § 37.2701 *et seq.* (West 1987); and (2) the district court's refusal to grant Furby relief on his claim brought pursuant to Michigan's Bullard-Plawecki Employee Right to Know Act (BPERKA) concerning events surrounding his December 1996 employment termination. For the reasons that follow, we **AFFIRM** the district court's grant of partial summary judgment and **AFFIRM** the district court's judgment in favor of Chrysler on Furby's BPERKA claim.

I. BACKGROUND

A. Facts

Chrysler hired Dale Furby on August 14, 1972, as a material handler at its Stamping Plant in Sterling, Michigan. Furby was a bargaining unit employee represented by the United Auto Workers ("UAW"). Furby received a written warning in August 1979 for operating a portable conveyor in a careless manner, and a second written warning the following month for his failure to return to work on time following his break. On September 1, 1986, Chrysler admitted Furby into the Chrysler Apprenticeship Program at its Stamping Plant in Sterling, Michigan.[1] In a January 1987 performance evaluation,

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[1]Successful completion of the four-year Apprenticeship Program, which requires almost 8,000 hours of on-the-job and classroom training, confers upon the participant journeyman status.

Furby's supervisor noted that Furby was "overly nervous," had difficulty "following and/or remembering instructions," and had a "low level of mechanical comprehension."[2] In subsequent evaluations in February, March, and July 1987, Furby's supervisors stated that Furby continued to have difficulty in the program. A July 24, 1987, reduction in force by Chrysler resulted in the removal from the program of all apprentices, including Furby, prompting Chrysler to reassign Furby to the hourly workforce. On March 18, 1991, after resumption of the Apprenticeship Program, Chrysler readmitted Furby and reassigned him to a different supervisor at the Stamping Plant in Warren, Michigan. A March 1991 performance evaluation, completed shortly after Furby's readmission to the Apprenticeship Program, noted that although Furby had "spent 2,159 hours in the trade," he still did "not know the basics." By memorandum dated May 9, 1991, Chrysler provided Furby with notice that if his performance did not improve, he would be removed from the Apprenticeship Program. Citing a lack of improvement, Chrysler, on June 21, 1991, removed Furby from the Apprenticeship Program and reassigned him to his former plant.

Furby resorted to the internal grievance procedure established pursuant to the collective bargaining agreement between Chrysler and UAW to appeal his removal from the Apprenticeship Program. The Chrysler-UAW National Apprenticeship Committee denied his appeal on February 25, 1992. By letter dated June 9, 1993, a UAW representative informed Furby that its investigation of the events surrounding Furby s dismissal from the Apprenticeship Program determined that he was discharged for "performance-related" reasons. In November and December 1992, Furby filed charges with the

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[2]Furby relies only upon this "overly nervous" comment to support his claim that Chrysler perceived that he suffered from a disability.

Michigan Department of Civil Rights ("MDCR"), alleging that Chrysler s removal of him from (and its failure to readmit him into) the Apprenticeship Program violated his civil rights under Title VII, specifically, that he had been removed because of his race (Furby is a white male). On July 9, 1993, the Equal Employment Opportunity Commission ("EEOC") issued its determination, finding that Furby had been removed from the Apprenticeship Program for poor performance.

On February 27, 1994, after observing Furby away from his designated workstation during normal business hours, Chrysler suspended Furby for his unauthorized absence from the plant. The suspension was later converted to a disciplinary layoff for the remainder of the shift. Furby never filed a grievance concerning Chrysler s disciplinary actions.

In August 1994, Chrysler received a report from a supervisor, William Kennedy, and a black employee, Al White, that Furby had referred to White in a racially derogatory manner. Thereafter, on August 22, 1994, Oliver Coleman, a black employee, complained that Furby had directed a racial slur towards him. On August 23, 1994, Chrysler notified Furby that it was placing him on suspension for "intimidating, coercing and using abusive language to others with racial over tone [sic]." Furby's return to work was conditioned upon his provision to Chrysler of satisfactory medical documentation confirming that he was able to resume his work responsibilities, and that he was safe to himself and to others. Negotiations between Chrysler and UAW resulted in an agreement whereby Furby s disciplinary suspension would be converted to a medical leave from which his return to work would be conditioned upon receipt of the necessary medical documentation. Furby provided the requisite documentation on October 27, 1994, and returned to work on November 1, 1994. In the months between Furby's suspension and his return to work, Furby filed a complaint with the MDCR, alleging that Chrysler actually discharged him because of its perception that he has a disability, and in retaliation for Furby's filing of

previous charges of employment discrimination. Also during this time, Dr. David Schwartz, a psychiatrist, spoke with Chrysler on September 7, 1994, and concluded, after consulting with Furby on two occasions, that Furby was "out of touch with reality" and unable to return to work in his present state. On September 26, 1994, Furby allegedly spoke with a member of Chrysler s Labor Relations Department and stated that he had received several preliminary psychiatric assessments, all of which
had concluded that in-patient treatment would be required. Furby denies that he made such a statement.

On August 26, 1994, in response to the disciplinary action taken by Chrysler, Furby filed a charge of discrimination with the EEOC, alleging: (1) that he had been terminated for falsely being accused of directing a racial epithet towards a co-worker, and (2) that Chrysler had attempted to force him to consult a psychiatrist, in violation of the Americans with Disabilities Act and in retaliation for his previous filings. On January 9, 1995, Furby filed a complaint with the MDCR and the EEOC, alleging retaliation and disability discrimination by UAW, and, in a separate charge, alleging retaliation by Chrysler. The EEOC responded by letter dated March 15, 1995, that its investigation did not reveal any evidence of retaliation or discrimination.

On January 29, 1996, Chrysler suspended Furby for reporting to work late, insubordination, and leaving the line without proper authorization, all stemming from an alleged incident on January 27, 1996. Chrysler converted the suspension to a four-day disciplinary layoff and transferred Furby, at his own request, to a new department. On March 23, 1996, Furby's supervisor, Nick Morosky, prepared a report in which he stated that he had repeatedly counseled Furby to arrive at work on time, but that Furby had continued to report to his position in an untimely manner. Morosky also stated in the report that Furby had made "threatening facial expressions" apparently in an attempt to intimidate him. Four days later, on

March 27, 1996, Morosky prepared another report in which he stated that Furby had again reported to the line late, refused to follow Morosky's instructions, and left the plant without prior authorization. Chrysler placed Furby on suspension on March 27, 1996, for this alleged conduct.

After discussions among Furby, UAW, and Chrysler's Labor Relations Department, Furby signed a Conditional Reinstatement, which provided that the March 27, 1996, suspension would be recorded as a one-day disciplinary layoff. The Conditional Reinstatement also provided that, in exchange for Furby's agreement not to file a grievance, no further action concerning this incident would be taken. On April 26, 1996, and again on May 5, 1996, Furby filed complaints with the EEOC, alleging that he had been the subject of race discrimination.

In September 1996, Furby, at his own request, was transferred to work on a blanker press machine. However, on October 3, 1996, after Chrysler received complaints from other employees that Furby was operating the machine in an unsafe manner, Furby was returned to his former position. Chrysler suspended Furby on October 3, 1996, for insubordination, working in an unsafe manner, and leaving his assigned workstation without prior authorization. On October 11, 1996, Furby, in consultation with UAW, entered into an agreement with Chrysler whereby Chrysler agreed to convert his October 3, 1996, suspension to a disciplinary layoff in exchange for Furby's agreement not to file a grievance. The terms of the agreement also required Furby to continue to abide by the provisions of the April 2, 1996, Conditional Reinstatement.

On December 6, 1996, Chrysler supervisor Dell Gillenwater stated that Furby was again reporting late to his position, and when instructed where to work, Furby allegedly became agitated and began to yell at Gillenwater. Chrysler suspended Furby as a result of this conduct. After negotiations with UAW, Chrysler, on December 12, 1996, invited Furby to return to work, subject to certain conditions. Specifically, Furby was to agree to return to work as a press operator and to remain

bound by the terms of the April 2,1996, Conditional Reinstatement for an additional six
months; in return, Chrysler agreed to record his suspension as a disciplinary layoff. Furby exercised his right to refuse the agreement, because he believed that the allegations of wrongdoing contained therein were false. Chrysler converted Furby's suspension to a discharge, effective December 6, 1996, and Furby filed a grievance, pursuant to the terms and conditions of the collective bargaining agreement. Ten months later, before final resolution of Furby's grievance, Furby decided he no longer wished to pursue the grievance, signed the same Conditional Reinstatement he had signed on April 2, 1996, and returned to work.

B. Procedural History

1. *Furby I*

On June 17, 1994, Furby initiated an action in the Wayne County Circuit Court ("*Furby I*") against UAW, alleging that it violated the Michigan Handicappers Civil Rights Act ("MHCRA") by failing to represent him when Chrysler removed him from the Apprenticeship Program.[3] Furby filed an amended complaint on August 23, 1994, in which he added Chrysler as a defendant and alleged that it violated the MHCRA by: (1) removing him from the Apprenticeship Program for a perceived handicap (Furby's "overly anxious" manner), and (2) retaliating against him for his filing of two complaints alleging discrimination. By order dated October 25, 1995, the court dismissed *Furby I* in its entirety.[4] In a May 30, 1997,

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[3]By order of summary disposition dated February 17, 1995, the Wayne County Circuit Court dismissed with prejudice all claims against UAW.

[4]Count I of Furby's complaint, which alleged that Chrysler discharged Furby from the Apprenticeship Program, in violation of the MHCRA, because of Chrysler's perception

unpublished opinion, the Michigan Court of Appeals affirmed the decision of the Wayne County Circuit Court.

2. *Furby II*

Furby filed the present action against Chrysler on August 14, 1995, in Macomb County (Mich.) Circuit Court ("*Furby II*"), alleging that Chrysler employees had made false and defamatory statements concerning his dangerous work habits, his use of racial slurs, and his abusive behavior towards co-workers (Count I). Chrysler removed the action to the United States District Court for the Eastern District of Michigan on December 11, 1995.[5] Furby amended his complaint on October 22, 1996, to include claims for retaliation (Count II), inclusion of false information contained within employment records (Count III), and maintenance of a policy of discrimination, in violation of the MHCRA (Count IV). On December 2, 1997, the district court granted Chrysler's motion for summary judgment as to Count IV of Furby's amended complaint, which alleged, in the alternative, both that Chrysler perceives Furby to have a handicap, and that "although Plaintiff believes he does not have a handicap, the proofs may establish that he does have a handicap and/or that he may need accommodation for purposes

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that Furby's general anxiety disorder would interfere with the performance of his job, was dismissed for Furby's failure to state a claim within the applicable statute of limitations period.

[5]Even though this action involves several state tort claims, Chrysler argued successfully that the question whether Furby was properly denied reentry into the Apprenticeship Program because of allegedly defamatory remarks made by Chrysler employees was governed by a collective bargaining agreement between Chrysler and UAW and subject to the Labor Management Relations Act, and thus removable to federal court.

of employment." In May 1999, a bench trial was conducted on the remaining three counts. The district court entered judgment in favor of Chrysler on all counts.

Furby now appeals the district court's December 2, 1997, grant of Chrysler's summary judgment motion as to Count IV. Furby also appeals the district court's May 1999 judgment in favor of Chrysler on Count III, which alleged that Chrysler now maintains false information in Furby's employee file, in violation of BPERKA. Thus, only the issues raised in Counts III and IV of Furby's amended complaint are before us on appeal.

II. DISCUSSION

A. MHCRA Claim

The district court granted Chrysler's motion for summary judgment as to Count IV on December 2,1997. In granting Chrysler s motion, the district court wrote:

> Plaintiff has alleged that Defendants discriminated against him because they perceived him as having a handicap. Plaintiff further alleges that this action was in violation of the Michigan Handicappers Civil Rights Act, MICH. COMP. LAWS ANN. § 37. 1101-.1607 (West 1987). While claiming a violation of the Handicappers Civil Rights Act, Plaintiff also asserts that he is not handicapped. Moreover, Defendants have not asserted that he is handicapped or that they believe that they perceive him has [sic] having a handicap. Plaintiff further contends that even though he does not have a handicap, that the proofs may establish that he does and that a reasonable accommodation can be provided. Without identifying the alleged handicap, nor requesting a reasonable accommodation for the alleged handicap, this Court cannot conclude that Plaintiff is a victim of handicap discrimination

> in violation of the Handicappers' Civil Rights Act. This Court cannot reasonably conclude that Defendants may be liable for a handicap that they do not believe that Plaintiff has, and that Plaintiff asserts that he does not have. Therefore, this Court will grant Defendants Motion for Summary Judgment on this handicap discrimination claim.

We review *de novo* the district court's grant of summary judgment, relying upon the same standards applied by the district court. See *Davis* v. *Sodexho, Cumberland Coll. Cafeteria*, 157 F.3d 460, 462 (6th Cir. 1998) (citing *Middleton* v. *Reynolds Metals Co.*, 963 F.2d 881, 882 (6th Cir. 1992))[6].

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[6]Furby seems to suggest that the district court's grant of summary judgment as to Count IV was akin to a grant of a motion to dismiss for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). Accordingly, he argues that, in conducting *de novo* review of the dismissal in the instant case, we must "accept all of the allegations in the complaint as true, and construe the complaint liberally in favor of the plaintiff," and not affirm the grant of a motion to dismiss unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Lawrence* v. *Chancery Court of Tennessee*, 188 F.3d 687, 691 (6th Cir. 1999) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)). It is true that in its order granting summary judgment as to Count IV, the district court stated that Furby had failed "to state a viable claim for handicap discrimination," suggesting that it may have applied a dismissal standard for review of a summary judgment motion. Even if the district court improperly treated Chrysler's motion for summary judgment as a motion to dismiss, it is well-established that a reviewing court may

Summary judgment is proper if the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See id.* (citing *City Mgmt. Corp.* v. *US. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994)). We consider all facts and inferences drawn therefrom in the light most favorable to the non-moving party. *See id.* To survive summary judgment, the non-movant must set forth more than a mere scintilla of evidence in support of its position; there must be sufficient evidence on which a jury could reasonably find for the non-moving party. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 251(1986).

We will focus first on the question whether, as Chrysler argues, we need not review the district court's grant of summary judgment because Furby's claims are barred by the doctrine of *res judicata* or by the applicable statute of limitations. Assuming Furby's claims are not barred as a matter of law, we will then determine whether the district court properly concluded that summary judgment was appropriate for Furby's failure to create a genuine issue of material fact on the question of whether Chrysler discriminated against him, in violation of the MHCRA.

1. *Res Judicata*

The doctrine of *res judicata* prevents the relitigation of the same claims that have been determined (or could have been determined) on the merits in a prior proceeding between the same parties. See *Brookins* v. *General Motors Corp.*, 843 F.2d 879, 880 (6th Cir. 1987). Under Michigan law, a party seeking to invoke *res judicata* to preclude further litigation must prove that: (1) the parties or their privies are the same; (2) the prior judgment was a final determination on the merits; and (3) the

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affirm the district court on *any* ground supported by the record, even if that ground is different from the grounds relied upon by the district court. See *Lawrence*, 188 F.3d at 691.

two suits involve the same cause or causes of action that were brought, or could have been brought with the exercise of due diligence, in the prior litigation. See *Smith, Hinchman & Grylls, Assocs., Inc.* v. *Tassic*, 990 F.2d 256, 257-58 (6th Cir. 1993). Chrysler now seeks to prevent
litigation of claims that were heard and resolved by the Wayne County Circuit Court's October 25, 1995, dismissal of *Furby I*. As noted in the discussion of this case's procedural history, Chrysler was a named party in both *Furby I* and *Furby II*; the individual named defendants in the present action (*Furby II*) were not parties to *Furby I*.

a. Chrysler

Chrysler was a party to *Furby I*, and the two suits arguably involved the same causes of action.[7] The question of

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[7]Furby argues that the two suits involve different causes of action: the lawsuit filed in Wayne County Circuit Court sought relief for Chrysler s *discharge* of Furby from the Apprenticeship Program on the basis of Furby's actual handicap, while the instant lawsuit seeks relief for Chrysler's refusal to readmit Furby to the Apprenticeship Program because of its maintenance of a policy of handicap discrimination. One reading of Furby's complaints would suggest that Furby relies upon each complaint to allege the same cause of action for Chrysler's policy of disability discrimination, but attempts to distinguish the two by pointing to different manifestations of that discrimination. While it is true that Michigan law bars "both claims actually litigated in a prior action and those claims arising out of the same transaction which plaintiff could have brought, but did not," *Schwartz* v. *City of Flint*, 466 N.W.2d 357, 359 (Mich. Ct. App. 1991), it is unclear whether Furby should have reasonably brought the failure-to-readmit action when he filed the discriminatory discharge action, or, whether, as he alleges, that each time Chrysler refused him readmission, a

whether the prior judgment was a final determination on the merits, however, must be resolved in favor of Furby. The Wayne County Circuit Court's finding that Furby had failed to state a claim under the MHCRA within the applicable statute of limitations would be deemed a final judgment on the merits under *federal* law. See FED. R. Civ. P. 41(b). Under Michigan law, however, such a dismissal does not operate as an adjudication on the merits. See *Malesev* v. *Garavaglia*, 162 N.W.2d 844, 845-46 (Mich. Ct. App. 1968). Accordingly, the doctrine of *res judicata* may not be invoked to preclude litigation of the instant claim against Chrysler.

b. Individual Named Defendants

It is undisputed that the individual named defendants in this case were not parties to the prior litigation. Neither are the individual named defendants privies of the parties to the prior action— Chrysler and UAW— as they did not acquire an interest in the subject matter of the prior lawsuit by "inheritance, succession, or purchase." *Eliason Corp.* v. *Bureau of Safety & Regulation of Mich. Dep't of Labor*, 564 F. Supp. 1298, 1305 (W.D. Mich. 1983) (quoting *Howell* v. *Vito's Trucking Excavating Co.*, 191 N.W.2d 313, 316 (Mich. 1971)). In an unpublished opinion, we have suggested that the lack of identity of parties, however, is not always fatal to a *res judicata* claim, noting that an exception to the "identity of parties" requirement may be found where "the liability of the defendant [in the present lawsuit] is entirely dependent upon the culpability of one exonerated in a prior suit." *Rowser* v. *Teamsters, Chauffeurs, Warehousemen & Helpers of America*, No. 94-1505, 1995 U.S. App. LEXIS 14721, *4-*5 (6th Cir.

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new cause of action was created. We need not resolve whether Furby has set forth two distinct causes of action, because as discussed *infra*, *Furby I* did not conclude with a final adjudication on the merits, thus rendering *res judicata* inapplicable.

June 9, 1995) (unpublished opinion). Such an exception would not apply to the individual named defendants—if Chrysler were found in an earlier proceeding to not have in place a policy of discrimination, then certainly it would be both inconsistent and illogical for a court to find that Chrysler employees, *independent of* Chrysler, maintained such a policy. Nevertheless, we need not reach this issue, as the defendants cannot demonstrate that the prior proceeding ended with a final judgment on the merits. *See* discussion *supra*, at II.A.1.a; *see also* n.7 (discussing whether the present litigation involves the same causes of action brought in the prior one). Accordingly, *res judicata* is inappropriate to bar litigation of the claims in the instant case.

2. Statute of Limitations

A plaintiff alleging disability discrimination in violation of the MHCRA must file a cause of action within three years of the alleged discrimination. *See* MICH. COMP. LAWS ANN. § 600.5805(8). Chrysler dismissed Furby from the Apprenticeship Program on June 21, 1991. Furby amended his complaint to add Chrysler as a party in August 1994, more than three years after his dismissal. Therefore, the Wayne County Circuit Court correctly concluded that Furby's claim as against Chrysler was time-barred.[8]

Furby emphasizes that the present action does not grieve his dismissal from the Apprenticeship Program; rather, he seeks relief for Chrysler's repeated refusals to readmit him to the Apprenticeship Program because of its policy of handicap discrimination. It is unclear whether Furby is in fact alleging an independent violation (i.e., one separate and apart from Chrysler's allegedly discriminatory discharge of him) or a

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[8]Furby filed a complaint against UAW on June 17, 1994, *i.e.*, within the applicable statute of limitations period. However, he did not amend his complaint to join Chrysler until August 30, 1994, after the statute of limitations had run.

continuing violation.[9] It appears that Furby has simply repackaged his *Furby I* discriminatory discharge claim as a failure-to-readmit (or failure-to-hire) claim in an attempt to avoid the reach of the applicable statute of limitations. In the first instance, Furby identifies no Chrysler policy of discrimination that could fairly be said to be discriminatory. One is left to assume on the basis of Furby's complaint that Chrysler had a policy of discriminating against "overly anxious" employees or against employees who suffered from anxiety disorders, even though Furby repeatedly states that he fit into neither such class of employees. Second, Furby's position, taken to its logical conclusion, would eliminate altogether the statute of limitations. If a plaintiff could extend the applicable statute of limitations for an MHCRA claim simply by requesting and being denied entry into a program (without demonstrating that his denial was based on a violation separate and apart from the challenged policy), then when, if ever, would the statute of limitations run? Such an argument is misguided as a matter of policy. Third, as discussed above, Furby puts forward no documentary evidence that he in fact sought reentry into the

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[9]To allege a continuing violation, Furby would necessarily have to argue that the initial violation was Chrysler's discriminatory discharge of him and that that violation continued with Chrysler's repeated refusals to readmit him into the Apprenticeship Program. This is not a continuing violation case: Furby was dismissed from the Apprenticeship Program as a result of *one* act; that he sought reentry into the program on repeated occasions thereafter (and as late as 1995) did not revive each time the expired statute of limitations period. Furby's June 21, 1991, dismissal from the Apprenticeship Program required that he file a civil action grieving that dismissal within three years. He did not. Thus, Furby must argue that Chrysler s refusal to readmit him was an independent violation.

Apprenticeship Program and, thus, it is impossible without a single date to determine, even assuming he is alleging an independent violation, whether Furby's claim is time-barred. Notwithstanding the foregoing, the current state of the record does not permit us to determine if this claim is barred as a matter of law. We need not resolve this issue, however, because, as discussed below, Furby' s failure to state a *prima facie* case of disability discrimination warranted the district court's grant of summary judgment as to Furby's MHCRA claim.

3. Basis for MHCRA Violation

Under Michigan law, an employer is prohibited from either (a) failing or refusing "to hire, recruit, or promote an individual because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position," or (b) "discharg[ing] or otherwise discriminat[ing] against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual s ability to perform the duties of a particular job or position." MICH. COMP. LAWS ANN. § 37.1202(1) (1995). A perceived disability, even if not one in fact, is a "handicap" within the meaning of MICH. COMP. LAWS ANN. § 37.1202(1). *See* MICH. COMP. LAWS ANN. § 37.1103(e)(iii) (noting that a claim may lie for discrimination that results from "[b]eing regarded as having a determinable physical or mental characteristic"); *Merillat* v. *Michigan State Univ.*, 523 N.W.2d 802, 805 (Mich. Ct. App. 1994) ("Defendants' perception of plaintiff as mentally unstable falls within the amended statutory definition of 'handicap.'"). To state a *prima facie* case of disability discrimination under the MHCRA, a plaintiff must prove that: (1) he is disabled within the meaning of MICH. COMP. LAWS ANN. § 37.1103(e); (2) that his disability is unrelated to his ability to perform his job duties; and (3) that he suffered an adverse employment action. See *Casteller* v. *Pepsi-Cola Metro. Bottling Co., Inc.*, 24 F.

Supp. 2d 782, 786 (E.D. Mich. 1998).[10]

Considering all facts and inferences in the light most favorable to Furby, Furby cannot state a *prima facie* case of discrimination. Furby's amended complaint alleges in the alternative both that Chrysler perceives Furby to have a handicap ("general anxiety disorder and/or the status of being overly nervous")—which, pursuant to MICH. COMP. LAWS ANN. § 37.1103(e) may provide an actionable claim under the MHCRA—and that, even though Furby does not believe that he suffers from a handicap, that "the proofs may establish that he does have a handicap and/or that he may need accommodation for purposes of employment."[11] Furby 's disability, assuming he in fact suffers from one, does interfere with his ability to perform his job, but he argues that with reasonable accommodation by Chrysler, he would be able to perform successfully.[12]

Furby's difficulty stems from his inability to make a

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[10]Some courts require a showing of a fourth element—proof of discriminatory intent by the employer—to state a *prima facie* case under the MHCRA. *See, e.g., Brown* v. *Sprint*, 891 F. Supp. 396, 399 (E.D. Mich. 1995) (citations omitted).

[11]Chrysler s lone comment concerning Furby's "overly nervous" behavior is insufficient to meet his burden of demonstrating that Chrysler perceived him to be disabled.

[12]As already noted, Furby does not believe that he is in fact handicapped. However, he argues that even assuming he is, he nevertheless would be able to perform his job duties if Chrysler provided him with "a fairly accepting, benign, supportive environment."

showing of the third requirement. While it is undisputed that Furby was discharged, at no point in his complaint, in his opposition to Chrysler s motion for summary judgment, or in his affidavit does he allege even one specific instance in which he sought reentry into the Apprenticeship Program and was denied by Chrysler. Never does he cite a particular date on which he applied (or was denied) or a specific person with whom he spoke about reentry into the Apprenticeship Program. Furby's amended complaint provides nothing more than a single, bare allegation that he "was removed from and regularly denied reentry into the skilled trades program because of a policy of handicap discrimination." Furby points to no evidence that Chrysler even knew of his alleged disability; as a practical matter, it is unclear how Chrysler could have been put on notice of a disability (and thus, taken an adverse action because of that disability) that, even today, Furby argues he does not have.[13] While it is true that a party need not prove its entire case to survive summary judgment, it must set forth more than a "mere existence of a scintilla" of evidence. *Anderson*, 477 U.S. at 252. Furby does not. Furby's failure to set forth any evidence to create an issue of material fact on the question of whether he suffered an adverse employment action would permit a district court to grant summary judgment on this claim.

B. Bullard-Plawecki Employee Right to Know Act

At a May 1999 bench trial, Furby argued that his December 6, 1996, employment termination was the result of false information that was contained within his personnel

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[13]We have found that a plaintiff failed to establish a *prima facie* case of disability discrimination where there was no evidence that the employer-decisionmaker had knowledge of the plaintiff's condition. *See Landefeld* v. *Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1181(6th Cir. 1993).

record.[14] He alleged that he was falsely accused by his supervisor, Del Gillenwater, of both reporting to his workstation five minutes after the shift had begun and leaving that workstation without authorization once he arrived. Furby testified, but Gillenwater did not. At the conclusion of the trial, the district court found in favor of Chrysler, noting that Furby had failed to demonstrate that the information contained within his personnel record was false.

We review a district court's findings of fact to determine if they are clearly erroneous. *See United States Dep't of Labor* v. *Cole Enters., Inc.*, 62 F.3d 775. 778 (6th Cir. 1995). We will conclude that a district court's factfinding is clearly erroneous "only when, although there may be some evidence to support the finding, 'the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Johnson* v. *Jones*, 149 F.3d 494, 499(6th Cir. 1998) (quoting *Anderson* v. *City of Bessemer City, N. C.*, 470 U.S. 564, 573 (1985)). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573-74. We review *de novo* conclusions of law, *see Cole Enters.*, 62 F.3d at 778, and questions of statutory construction, *see United States* v. *Kassouf* 144 F.3d 952, 955 (6th Cir. 1998).

Under Michigan law, "[i]f either the employer or the employee *knowingly* places in the personnel record information

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[14]Although Furby filed his amended complaint on October 22, 1996, the facts concerning his December 6, 1996, employment termination nevertheless were at issue during the May 1999 bench trial. Apparently, the district court in its final pretrial order expanded the scope of the issues to be litigated at trial to include events that postdated Furby's complaint.

which is false, then the employer or employee, whichever is appropriate, shall have remedy through legal action to have that information expunged." MICH. COMP. LAWS ANN. § 423.505 (emphasis added). Violation of this provision creates a cause of action under which the aggrieved party may seek compliance with BPERKA. See MICH. COMP. LAWS ANN. § 423.5 11. Furby's principal argument at trial was that because his personnel record contained information concerning Furby's deficiencies (and Chrysler's disciplinary action against him) and because Furby continually denied any wrongdoing, then all such information must be deemed false and he, therefore, should be entitled to both damages and removal of the "false" information. Furby's appeal focuses only on information in his file concerning the December 1996 encounter with Gillenwater.

The district court had ample evidence in the record to support its finding.[15] Several of Furby's co-workers testified, and each stated that the events as reflected in Furby's personnel record were consistent with their recollections of the facts. The district court concluded on the basis of this testimony, and on a finding that Furby's testimony was not credible, that Furby failed to demonstrate that the adverse information contained within his personnel record was false.

III. CONCLUSION

Accordingly, we **AFFIRM** the district court's grant of partial summary judgment and the district court's judgment in

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[15]Furby also suggests that the district court erred by limiting his ability "to admit into evidence all of the Chrysler personnel records pertaining to him for the limited purpose of showing the false information which he desired to challenge." We find no error. The district court permitted Furby to introduce excerpts of relevant records on the question of his alleged wrongdoing, and additional evidence on this question would likely have been cumulative.

favor of Chrysler on Furby's BPERKA claim.

APPENDIX B

JUDGMENT IN A CIVIL CASE

United States District Court	EASTERN DISTRICT OF MICHIGAN
CASE TITLE DALE FURBY V.	DOCKET NUMBER 95-CV- 75956 —DT
AL WHITE, ET AL	NAME OF JUDGE OR MAGISTRATE HON. PATRICK J. DUGGAN

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants recover of the plaintiff their costs of action.

/s/_____
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DEPUTY CLERK
MARILYN OREM

DATE MAY 13 1999

APPENDIX C
Case No: 99-1712

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FILED
FEB 28 2001

LEONARD GREEN, Clerk

DALE FURBY
Plaintiff-Appellant

v.

AL WHITE; OLIVER COLEMAN;
BILL KENNEDY; CHRYSLER CORPORATION;

Defendants - Appellees

FRANK PITONYAK

Defendant

BEFORE: KEITH, BOGGS, and COLE, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DALE FURBY,

Plaintiff(s), Case Number: 95-CV-75956-DT

-vs.- JUDGE PAUL D. BORMAN
UNITED STATES DISTRICT COURT

AL WHITE, OLIVER COLEMAN, BILL KENNEDY. FRANK PITONYAK and CHRYSLER CORPORATION,

Defendant(s).
_____/

OPINION AND ORDER
GRANTING IN PART, AND DENYING IN PART
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendants' Motion for Summary Judgment. Having entertained oral argument on the motion and reviewed the pleadings filed, this Court will grant in part, and deny in part Defendants' motion for the following reasons.

Facts

This matter arises in the employment context. Plaintiff was employed with Defendant Chrysler Corporation as an hourly worker for twenty-four years, from 1972 until 1996, in various positions within Defendant Chrysler's automobile plants. Plaintiff applied for a position in the skilled trades program, to which he was admitted. Plaintiff worked in the skilled trades program from 1986 until 1991 when he was removed.

During the time of his apprenticeship, Plaintiff received

numerous memoranda, and complaints about his work habits, attendance, and insubordination. Defendant documented numerous episodes of Plaintiff's inability to follow instructions, to perform the job safely, and to work congenially with others. In response to every complaint or memorandum, Plaintiff would file a claim with the Equal Employment Opportunity Commission, the Michigan Civil Rights Commission, or Plaintiff would file a grievance with the union.

Plaintiff filed suit against Defendants in Wayne County Circuit Court in December 1995 while he was still employed with Chrysler, alleging that he, should not have been removed from the skilled trades program. In that state court action, Plaintiff alleged that he had been discriminated against because of his race,[1] and because of a perceived handicap, that he had been retaliated against for his numerous grievances and EEOC charges, and that Defendants had defamed him. Plaintiff's state court action was summarily dismissed as a result of being time barred, and for failing to provide significant facts to support his allegations. Plaintiff appealed the state circuit court's decision to the Michigan Court of Appeals which affirmed the circuit court.[2]

Plaintiff now brings another suit against Chrysler Corporation, and four individuals in which he alleges causes of action which are congruent with those that were alleged against Chrysler Corporation and the United Auto Workers in Plaintiff's state court actions. Defendants have filed the instant Motion for Summary Judgment arguing that the doctrine of res judicata is applicable and that there are no genuine issues of material fact to be decided.

Standard for Summary Judgment

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[1]Plaintiff is a white male.

[2]Defendants' Brief in Support of Summary Judgment, Supplemental Exhibit - Furby v. UAW, No. 190429

Pursuant to the Federal Rules of Civil Procedure, a party against whom a claim, counterclaim, or cross-claim is asserted may "at any time, move with or without supporting affidavits, for a summary judgment in the party's favor as to all or any part thereof." Fed. R. Civ. P. 56(b). A summary judgment shall be entered if the moving party manifests that there is no genuine issue as to any material fact, and if the evidence presented is such that a reasonable jury could find only for the moving party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247-48 (1986). A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect [the] application of appropriate principle[s] of law to the rights and obligations of the parties."Kendall v Hoover Co . 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)) (citations omitted). This "burden on the moving party may be discharged by... pointing out to the district court ... that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In making this evaluation, the court is authorized to examine any documents in a light most favorable to the non-moving party. See Bender v. Southland Corp., 749 F.2d 1205, 1210-11 (6thCir. 1984).

If the burden is met by the moving party, the non-moving party's failure to make a showing that is "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" will mandate the entry of summary judgment. Celotex, 477 U.S. at 322-23 (1986). The non-moving party may not rest upon the mere allegations or denials of his pleadings, but the response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts which demonstrate that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The rule requires the non-moving party to introduce evidentiary quality evidence demonstrating the existence of a material fact. Bailey v. Floyd

Ctv. Bd. of Ed., 106 F.3d 135 (6th Cir. 1997). The content of the evidence must be admissible, despite the inadmissibility of its form. Id.

Discussion

In the present matter, Plaintiff is alleging that Defendants have defamed him, retaliated against him, violated the Bullard-Plawecki Right to Know Act, Mich. Comp. Laws Ann. §§ 423.501-611, by maintaining false information about Plaintiff in his employment file, and have violated the Handicapper's Civil Rights Act, Mich.Comp. Laws Ann. § 37.1101-. 1607 (West 1987). Defendants assert that Plaintiff has already litigated these claims and lost, and further assert that for any claim that was not litigated previously, it should have been litigated because all of the allegations involve periods of time that were addressed in prior litigation.

Defamation

In Plaintiff's First Amended Complaint, he alleges in Count I that the individual Defendants defamed him.[3] Plaintiff states that the false comments were allegedly made in August 1994. Plaintiff's original Complaint was filed with this Court in December 1995. The statute of limitations on a claim of defamation in the state of Michigan is one year. See Mich. Comp. Laws Ann. § 600.5805(7) (West 1987). Plaintiff has filed this action for defamation outside of the one year statute of limitations, and thus can no longer pursue this claim. Accordingly, the Court will grant Defendants' Motion for Summary Judgment on Plaintiff's defamation claim.

Retaliation and Defamation

Plaintiff alleges that Defendant Chrysler retaliated against him for asserting both handicap and racial discrimination claims. Plaintiff refers to various periods of time to support this claim. The Court will consider the claims that were alleged to have occurred after December 1995, as those

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[3]First Amended Complaint at ¶¶ 10-26.

that occurred prior to December 1995 are concluded to be foreclosed by the doctrine of collateral estoppel. Collateral estoppel prevents the re-litigation of factual or legal issues which were necessarily decided by a previous final judgment by a court of competent jurisdiction. Smith v. Sushka, 117 F.3d 965, 969 (6th Cir. 1997). The claims that have been alleged to have occurred prior to December 1995 were litigated by Plaintiff and Defendant Chrysler, or its privies, in the state trial and appellate courts.

Plaintiff contends that at various times he reported to work only to find that there was nothing for him to do. He was not able to successfully convince anyone to assign a job to him. Even though Plaintiff was not assigned any work and there was nothing for him to do, Plaintiff contends that Defendant Chrysler's management placed him on disciplinary suspensions for reporting to work late, leaving without permission, and the failure to follow instructions.[4] It is also asserted that the individual Defendants conspired against him because of his handicap and racial discrimination claims. Defendants merely argue that Plaintiff has failed to state a claim for which relief may be granted. Therefore, the Court must accept Plaintiff's averments and conclude that there is a genuine issue of material fact regarding whether Defendants retaliated against Plaintiff for exercising his protected rights. Plaintiff's claims of defamation are foreclosed for reasons stated in the section discussing Plaintiff's defamation count.

Bullard-Plawecki Right to Know

Plaintiff contends that Defendant Chrysler is maintaining false information about him in its employment files in violation of the Bullard-Plawecki Right to Know Act. Defendant Chrysler asserts that all of the information in its employment files regarding Plaintiff, or any other employee, is true and can be substantiated to the best of its knowledge.

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[4]Id. at ¶ 34(e).

However, since the information is relative to the remaining portions of Plaintiffs retaliation claim, this Court cannot conclude that summary judgment is appropriate for this claim. Genuine issues of material fact must be decided in determining this claim.

Michigan Handicappers' Civil Rights Act

Plaintiff has alleged that Defendants discriminated against him because they perceived him as having a handicap. Plaintiff further alleges that this action was in violation of the Michigan Handicappers' Civil Rights Act, Mich. Comp. Laws Ann. § 37.1101-.1607 (West 1987). While claiming a violation of the Handicappers' Civil Rights Act, Plaintiff also asserts that he is not handicapped. Moreover, Defendants have not asserted that he is handicapped or that they believe that they perceive him has having a handicap. Plaintiff further contends that even though he does not have a handicap, that the proofs may establish that he does and that a reasonable accommodation can be provided. Without identifying the alleged handicap, nor requesting a reasonable accommodation for the alleged handicap, this Court cannot conclude that Plaintiff is a victim of handicap discrimination in violation of the Handicappers' Civil Rights Act. This Court cannot reasonably conclude that Defendants may be liable for a handicap that they do not believe that Plaintiff has, and that Plaintiff asserts he does not have. Therefore, this Court will grant Defendants' Motion for Summary Judgment on this handicap discrimination claim.

Conclusion

This Court concludes that Plaintiff's claim of defamation is barred by the statute of limitations, and that he has failed to state a viable claim for handicap discrimination. As for Plaintiff's claims for retaliation that occurred subsequent to December, 1995, and Defendants' violation of the Bullard-Plawecki Right to Know Act, this Court concludes that there are genuine issues of material fact to be decided.

Accordingly, this Court GRANTS Defendants' Motion

for Summary Judgment as to the defamation and handicap discrimination claims, and DENIES Defendants' Motion for Summary Judgment as to the acts of retaliation that occurred subsequent to December 1995, and as to Bullard-Plawecki Right to Know Act claims.

SO ORDERED.

/s/_____
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: Dec -2 1997
Detroit, Michigan

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DALE FURBY,

Plaintiff(s), Case Number: 95-CV-75956-DT

-vs.- JUDGE PAUL D. BORMAN
UNITED STATES DISTRICT COURT

AL WHITE, OLIVER COLEMAN, BILL KENNEDY. FRANK PITONYAK and CHRYSLER CORPORATION,

Defendant(s).

_____/

ORDER (1) DENYING IN PART IN GRANTING IN PART PLAINTIFF'S MOTION TO ALTER OR AMEND 12/2/97 DECISION, OR IN THE ALTERNATIVE, FOR REHEARING OR RECONSIDERATION (2) SETTING ORAL ARGUMENT FOR NOVEMBER 9, 1998 AT 2:30 PM ON THE ISSUE OF WHETHER PLAINTIFF'S DEFAMATION CLAIMS ARE BARRED UNDER THE DOCTRINES OF RES JUDICATA/COLLATERAL ESTOPPEL (3) REQUIRING SPECIFIC BRIEFING OF UP TO 10 PAGES ON DEFAMATION CLAIM: DEFENDANT BRIEF IS DUE OCTOBER 27, 1998; PLAINTIFF'S BRIEF IS DUE NOVEMBER 4, 1998

Before the Court is Plaintiff's Motion to alter or Amend 12/2/97 Decision, or in the Alternative, for Rehearing or Reconsideration. In that decision, the Court concluded, inter

alia, that Plaintiff's claim of defamation was barred by the statute of limitations. For the following reasons, the Court GRANTS in part and DENIES in part the motion.

I.

Eastern District of Michigan Local Rule 7.1(h) governs motions for reconsideration. The standard by which the Court must determine whether to grant a motion for reconsideration is outlined in section (3):

> (3) Grounds. Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have misled but also show that a different disposition of the case must result from a correction thereof.
> E.D. LR 7.1(h)(3).

II.

Plaintiff complains of three errors in the Court's December 2, 1997 decision, which granted in part and denied in part Defendants' Motion for Summary Judgment: (1) that the Court erred in finding that Plaintiff filed his defamation claim in December of 1995 instead of August 14, 1995; (2) that the Court erred by finding that the cutoff date for purposes of collateral estoppel is December of 1995 instead of August 14, 1995; (3) that Plaintiff responded to Defendants' arguments adequately to preclude summary judgment, but the Court granted the motion on other grounds.

Defendants agree that the complaint was filed originally in state court on August 14, 1995 and removed on December 8, 1995. Thus, the cutoff date for purposes of collateral estoppel was August 14, 1995 rather than the date used by the Court, December 8, 1996.

Defendants contend, however, that while the statute of limitations does not bar the defamation claims, the claims are barred by the doctrines of *res judicata* and collateral estoppel. Defendants note that in the state court proceeding, the court addressed all alleged claims of defamation that occurred up to the date of September 15, 1995.

Defendants further assert that this Court did not err in granting summary judgment on the Michigan Handicappers' Civil Rights Act claim. In sum, Defendants contend that Plaintiff's case should be dismissed in its entirety based on *res judicata* and collateral estoppel.

III.

This case was originally filed in Macomb County Circuit Court on August 14, 1995. Subsequently, Defendants removed the case to federal district court on December 8, 1995, and the case was assigned to this Court.

In the December 2, 1997 Order, as to Count I, this Court granted summary judgment on statute of limitations grounds based on a finding that the complaint's filing date was December of 1995. However, as correctly noted by Plaintiff in his Motion for Reconsideration, the case was originally filed on August 14, 1995 and removed on December 8, 1995. The Court amends the December 2, 1997 Order to reflect that the cutoff date for purposes of collateral estoppel on the defamation and retaliation claims is August 14, 1995. Thus, any defamatory statements made after August 14, 1994 are not covered by the Defendants' statute of limitations claim.

Accordingly, Defendants' Motion for Summary Judgment as to Count I on statute of limitations grounds is DENIED. The Court will hear argument on November 9, 1998 on Defendants' Argument for Summary Judgment as to Count I on the grounds of *Res Judicata*/Collateral Estoppel.

IV.

As to Plaintiffs third argument, the Court DENIES the motion. In the December 2 Order, the Court granted summary judgment on the Michigan Handicappers' Civil Rights Act

("MHCRA") claim on the ground that Plaintiff failed to state a viable claim. M.C.L. Section 37.1101-.1607. Plaintiff contends that the Court inappropriately granted the motion for summary judgment on this claim because Defendants raised only collateral estoppel, *res judicata* and statute of limitations issues, to which he adequately responded.

The Court finds that Plaintiffs argument fails to meet the standard provided in LR 7.l(h)(3). The Court has previously evaluated Plaintiffs claim under the MHCRA to determine whether it had been litigated in the previous lawsuit. In so doing, the Court necessarily reviewed the substance of the claim and found that no claim had been stated. Plaintiff was on notice that the MHCRA claim would be under scrutiny based upon Defendants' motion. Moreover, Plaintiff had an opportunity to further respond at oral argument. Thus, Plaintiffs request for the Court to reconsider its ruling on the MHCRA claim does not demonstrate a palpable defect by which the Court and parties have been misled; nor has Plaintiff shown that a different disposition of the case must occur. Accordingly, Plaintiff's motion is DENIED as to his third claim of error.

V.

For the reasons stated above, Plaintiffs Motion to Alter or Amend 12/2/97 Decision, or in the Alternative, Rehearing or Reconsideration is GRANTED IN PART AND DENIED IN PART. The Court will hear argument on Defendant's Motion for Summary Judgement on the Defamation claim on November 9, 1998. The parties shall supplement their briefing on this issue by filing a Memorandum of not more than 10 pages by the dates set forth in the heading of this order.

SO ORDERED.

/s/_____
PAUL D. BORMAN

UNITED STATES DISTRICT JUDGE

DATED: OCT 18 1998

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

DALE FURBY,

Plaintiff,

-vs- Case No. 95-75956
Hon. Paul D. Borman

AL WHITE, OLIVER COLEMAN, BILL KENNEDY, FRANK PITONYAK and CHRYSLER CORPORATION

Defendants.
_____/

GREGORY T. ZALECKI (P27900)
Attorney for Plaintiff
30500 Van Dyke Ave., Suite 704
Warren, Mi. 48093
(810) 573-2600 (810) 573-7202 (FAX)

GREGORY S. MUZINGO (P29914)
MARGARET A SUMA (P34373)
Office of the General Counsel
Chrysler Corporation
Attorney for Defendants
1000 Chrysler Drive
Auburn Hills, 48326-2766
(810) 512-4088 (810) 512-4885 (FAX)
_____/

FIRST AMENDED COMPLAINT

Plaintiff, DALE FURBY, states as follows:

COUNT I - DEFAMATION

1. Plaintiff, DALE FURBY, is a resident of the County of Macomb and the state of Michigan.

2. Defendant, AL WHITE, is a resident of the state of Michigan.

3. Defendant, OLIVER COLEMAN, is a resident of the state of Michigan.

4. Defendant, BILL KENNEDY, is a resident of the state of Michigan.

5. Defendant, FRANK PITONYAK, is a resident of the state of Michigan.

6. Defendant, CHRYSLER CORPORATION, has its principal place of business located within the state of Michigan and has more than one place of business located within Macomb County Michigan.

7. The incidents giving rise to this complaint occurred within Macomb County Michigan.

8. The amount in controversy exceeds $10,000.00.

9. AL WHITE, OLIVER COLEMAN, BILL KENNEDY, and FRANK PITONYAK were employees of CHRYSLER CORPORATION acting within the course and scope of their employment at the times of the incidents referred to herein.

10. On or about August 13, 1994 and/or August 14, 1994 AL WHITE falsely accused DALE FURBY of making racially derogatory remarks in the work place at CHRYSLER CORPORATION. The statement(s) was(were) substantially as follows: AL WHITE accused DALE FURBY of calling AL WHITE a big black nigger (or a big fat nigger). Additionally, DALE FURBY was falsely accused of saying, in reference to AL WHITE, "There's that big fat nigger whose been causing all the problems." In the alternative, said false statement(s) was(were) made and/or repeated by BILL KENNEDY and/or FRANK PITONYAK. The statements also have been reported to be as follows: "There's that big fat black nigger whose been causing all the problems" and "The big black fat nigger is lying

on him"

11. On or about August 22, 1994 OLIVER COLEMAN falsely accused DALE FURBY of making racially derogatory remarks in the work place at CHRYSLER CORPORATION. The statement was substantially as follows: OLIVER COLEMAN accused DALE FURBY of saying "why are all you black mother fuckers sitting on your ass." This statement was caused to be placed within Plaintiff's employment file and repeated by BILL KENNEDY and/or FRANK PITONYAK.

12. Minor deviations with respect to said statements are possible because CHRYSLER refuses to release copies of the statements and reports concerning the statements to Plaintiff.

13. On or about August 13, 1994 and thereafter BILL KENNEDY and FRANK PITONYAK falsely accused DALE FURBY of having dangerous work habits and making racial slurs during the course of his employment at CHRYSLER CORPORATION.

14. On or about August 13, 1994 and thereafter BILL KENNEDY and FRANK PITONYAK falsely accused DALE FURBY of coercing and intimidating, as well as being abusive toward, fellow employees during the course of his employment at CHRYSLER CORPORATION.

15. Each of the statements referred to above were known to be false by the maker of the statements or made in reckless disregard of the truth or falsity of those statements.

16. At all times pertinent hereto BILL KENNEDY and FRANK PITONYAK desired to have DALE FURBY removed from the work force at CHRYSLER CORPORATION and encouraged the making of said false statements by not only the above referenced individuals, but also similar false statements were encouraged to be made by other employees of CHRYSLER CORPORATION.

17. The aforesaid false statements were published and disclosed to coworkers and union representatives of

Plaintiff as well as supervisors and other management personnel of CHRYSLER CORPORATION.

18. The aforesaid false statements were made a part of Plaintiff's personnel record and other corporate records at CHRYSLER CORPORATION.

19. Plaintiff is and has been desirous of obtaining a position in skilled trades at CHRYSLER CORPORATION.

20. Because the false statements referred to above have been made part of Plaintiff's records at CHRYSLER CORPORATION his ability to pursue and obtain a skilled trades position has been severely impaired.

21. The false statements referred to above were made by employees of CHRYSLER CORPORATION in the course and scope of their employment with CHRYSLER CORPORATION.

22. As a proximate result of said false statements Plaintiff was discharged (later changed to a suspension and medical leave) from his employment at CHRYSLER CORPORATION.

23. As a further proximate result of said false statements Plaintiff was forced to obtain medical treatment which has made it appear that he has certain mental problems which he does not have. Such information has been placed within Plaintiffs' records at CHRYSLER CORPORATION and is also false.

24. As a proximate result of said false statements Plaintiff has suffered and will continue to suffer the following damages:

a) damage to his reputation;
b) mental and physical pain and suffering;
c) wage loss;
d) lost opportunities for promotion including promotion to the skilled trades;
e) medical expense; and
f) humiliation and embarrassment.

25. Plaintiff is entitled to exemplary damages due to the intentional and/or reckless nature of the false statements.

26. As long as said false statements are a part of Chrysler's personnel and labor records Plaintiff will be suffering irreparable harm.

WHEREFORE, Plaintiff, DALE FURBY, requests that this Honorable Court enter judgment against each of the defendants in an amount which is fair and just and in accordance with the evidence adduced at trial, together with exemplary damages, costs, interest and attorney fees. Plaintiff further requests injunctive relief requiring CHRYSLER CORPORATION to delete all of the above referenced false statements from its corporate, labor and personnel records.

COUNT II - RETALIATION AND DEFAMATION

27. Plaintiff reincorporates by reference and realleges each allegation referred to above.

28. Plaintiff has previously pursued perceived handicap discrimination (hereinafter referred to as handicap discrimination) and racial discrimination claims, as well as NLRB claims, against Defendant, CHRYSLER CORPORATION, for which retaliation is prohibited by law, which include:

a) a handicap discrimination claim filed during December 1991 (all dates referred to herein are approximate) with the Michigan Department of Civil Rights (MDCR), relating to Plaintiff's dismissal from the Chrysler skilled trades program;

b) a handicap discrimination and retaliation (relating to handicap and racial discrimination) claim filed in the Wayne County Circuit Court during June 1994; and

c) handicap and racial discrimination claims, filed with the EEOC and the MDCR, relating to Plaintiff's August 1994 suspension based upon false allegations that plaintiff used racial slurs;

29. Plaintiff's right to pursue these claims without retaliation from his employer Chrysler Corporation is protected by MCL 37.1602 and MCL 37.2701, as well as other federal and state law.

30. As a proximate result of Plaintiff pursuing these claims certain managers, supervisors and other employees of Chrysler Corporation, all acting within the scope of their employment have become upset with Plaintiff and have decided to retaliate against him.

31. The Chrysler employees referred to have conspired to ruin Plaintiff's employment record and ultimately obtain his dismissal as an employee of Chrysler.

32. The aforesaid Chrysler employees are pursuing a common plan which entails the creation of a progressive disciplinary record against the Plaintiff which is based upon false allegations of wrongdoing.

33. Plaintiff has always been a good worker for Chrysler.

34. Defendant, Chrysler Corporation's, retaliation against the Plaintiff includes the following:

a) On or about 2/28/94 Plaintiff was falsely accused of being out of the plant during working hours and given a one day suspension.

b) During August, 1994 Plaintiff was falsely accused of making racial slurs (as described in Count I) and given a three day suspension. The suspension was subsequently converted to a medical leave based upon the false allegation that Plaintiff was mentally unstable. As a result of this involuntary leave Plaintiff lost considerable wages and was not allowed to work for approximately 8 ½ weeks.

c) On or about October 29, 1995 Plaintiff was given a verbal warning for allegedly being late for work, when in fact he was there on a timely

basis.

d) On or about January 29, 1996 Plaintiff reported for overtime work. Plaintiff waited to be assigned to a job. When it appeared that there was no work for Plaintiff to perform, he asked to be sent home without pay. A part of the aforesaid Chrysler employees' plan was to make it appear that Plaintiff was shirking his job responsibilities by intentionally not assigning work to him. Chrysler never did assign Plaintiff to a job on that day. Plaintiff was then suspended for four days based upon false allegations of "Reporting to the line late, insubordination and, and leaving the line without permission."

e) On or about March 27, 1996 Plaintiff reported for work as a press operator. Again Plaintiff waited to be assigned a job, but was never assigned a job. Plaintiff tried to have a job assigned to him unsuccessfully. Plaintiff was then given another disciplinary suspension based upon the false allegations of "1) Unexcused tardiness (late reporting to line); 2) failure or refusal to follow instructions of supervision; and 3) leaving the plant during working hours without permission." Plaintiff was forced to sign a statement putting him on probation for one year and waiving any right to file a grievance by threats that he would lose his job immediately if he did not sign the statement.

f) Plaintiff has regularly been assigned to work in unsafe working conditions.

g) Chrysler continues to maintain records falsely indicating that Plaintiff is not qualified for the Chrysler skilled trades program.

h) On or about October 3, 1996 Plaintiff was

suspended for "refusing to follow a supervisor's instructions; working in an unsafe manner; and leaving his assigned work area without authorization." The suspension lasted until October 14, 1996. The suspension was without basis in fact.

35. All of the above referenced actions taken against the Plaintiff were taken pursuant to a plan and conspiracy among the aforesaid Chrysler employees to create a progressive disciplinary record against Plaintiff which would then be used to ultimately terminate his employment.

36. Most of the union officials in the union representing Plaintiff are also upset with the Plaintiff and retaliating against the Plaintiff because the aforesaid discrimination complaints also involve the union. For this reason the Plaintiff's labor union has failed to take anything but perfunctory and useless steps toward correcting Chrysler's false allegations against Plaintiff.

37. With respect to the false allegations pertaining to Plaintiff and referred to above, Plaintiff has never been given a hearing, informed of the exact basis for the charges, given an opportunity to confront his accusers, given an opportunity to fully explain his version of the events to Chrysler, nor has he been given a fair opportunity to contest the charges. Further, Chrysler has never held any type of a hearing to determine if the charges were in fact true.

38. Plaintiff is desirous of obtaining reentry into the Chrysler skilled trades program.

39. As a result of the aforesaid false statements and resulting disciplinary record Plaintiff is suffering immediate and irreparable harm. His job is in jeopardy. His reputation among Chrysler management and other employees is being ruined. His hopes of reentering the skilled trades program are being quashed.

40. The accusations against Plaintiff are false and defamatory. The records which Chrysler maintains pertaining

to the allegations made against Plaintiff are false and defamatory.

41. Said accusations and records pertaining to Plaintiff are known to be false by Chrysler or, in the alternative, Chrysler employees have made the allegations and kept the records with reckless disregard for their truth or falsity.

42. The aforesaid Chrysler employees are willfully and knowingly retaliating against Plaintiff for pursuing the discrimination claims referred to above.

43. The above referenced actions by said Chrysler employees constitute an intentional interference with Plaintiff's contract of employment with Chrysler.

44. In addition to the above Plaintiff has suffered and will continue to suffer:

a) damage to his reputation;
b) mental suffering;
c) severe impairment or impossibility of obtaining reentry into the Chrysler skilled trades program;
d) lost wages;
e) attorney fees necessary to prosecute this action; and
f) exemplary damages.

WHEREFORE, Plaintiff, DALE FURBY, requests that this Honorable Court grant him the following relief:

A preliminary and permanent injunctive order:

a) prohibiting Chrysler and its management employees from making false allegations against the Plaintiff, taking disciplinary action against the Plaintiff based upon false allegations, and putting false allegations pertaining to the Plaintiff in his employment files;
b) in the event that Chrysler desires to place derogatory information in Plaintiff's employment file or take disciplinary action against Plaintiff

based upon charges which Plaintiff contests, requiring Chrysler to hold a hearing wherein Plaintiff will be given advance notice of the charges against him, an opportunity to be heard, an opportunity to confront his accusers and a fair opportunity to contest the charges; and

c) requiring Chrysler to expunge all of the false information contained in Plaintiff's employment records and referred to in paragraph 34 above;

d) requiring Chrysler to readmit Plaintiff to the Chrysler skilled trades program, and

a judgment which is fair and just and in accordance with the evidence adduced at trial together with an award for actual attorney fees and exemplary damages.

COUNT III - EXPUNGEMENT OF EMPLOYMENT RECORDS

45. Plaintiff reincorporates by reference and realleges each allegation referred to above.

46. MCL 423.501 et. seq. prohibits an employer from maintaining information known to be false in an employees personnel records.

47. Defendant, Chrysler Corporation, is maintaining the following information known to be false within Plaintiff's personnel records:

a) information pertaining to the five disciplinary suspensions/medical leaves referred to above;

b) information indicating that plaintiff is not qualified to be involved in the skilled trades program at Chrysler; and

c) information indicating that Plaintiff has a mental problem affecting his ability to perform his job as well his ability to successfully complete the skilled trades program.

48. The maintenance of this derogatory information within Plaintiff's personnel records is causing the Plaintiff to suffer immediate and irreparable harm as indicated above.

49. Chrysler's actions in maintaining said false information pertaining to the Plaintiff within its files constitutes a willful and knowing violation of MCL 423.501 et. seq.

50. As a proximate result of Chrysler's maintenance of records pertaining to Plaintiff which contain false information, Plaintiff has suffered and will continue to suffer the damages alleged in Count II.

WHEREFORE, Plaintiff, DALE FURBY, requests that this Honorable Court grant him the following relief:

A preliminary and permanent injunctive order:

a) requiring Chrysler to expunge all of the false information contained in Plaintiff's employment records and referred to in paragraph 34 above;

b) requiring Chrysler to readmit Plaintiff to the Chrysler skilled trades program, and

a judgment which is fair and just and in accordance with the evidence adduced at trial together with an award for actual attorney fees and exemplary damages.

COUNT IV - POLICY OF DISCRIMINATION

51. Plaintiff reincorporates by reference and realleges each allegation referred to above. This Count is brought by Plaintiff pursuant to the Michigan Handicapper's Civil Rights Act - MCL 37.1101 et.seq.

52. Defendant, CHRYSLER CORPORATION, perceives Plaintiff, DALE FURBY, to have a handicap.

53. In the alternative, although Plaintiff believes he does not have a handicap, the proofs may establish that he does have a handicap and/or that he may need accommodation for purposes of employment. Such accommodation would not impose an undue hardship upon Defendant, CHRYSLER CORPORATION, and would require that CHRYSLER provide a fairly accepting, benign, and supportive work environment to

Plaintiff.

54. The perceived or actual handicap referred to above is general anxiety disorder and/or the status of being overly nervous and/or adjustment reaction with anxious mood and/or emotional impairment.

55. The perceived or actual handicap referred to above is unrelated to Plaintiff's ability to perform his present job and the jobs at Chrysler known as skilled trades.

56. Plaintiff, DALE FURBY, is qualified to perform as an apprentice in all of the skilled trades programs offered at Chrysler Corporation and, in particular, the skilled trades known as toolmaker J & F, die maker, millwright, electrician and machine repair.

57. Plaintiff, DALE FURBY, was previously removed from the skilled trades apprenticeship program at Chrysler Corporation, during June 1991, for the alleged reason that he was not qualified for the position.

58. Such reason was false and a pretext for discrimination.

59. Since Plaintiff's removal from the skilled trades program, he has regularly and continuously sought reentry into the program.

60. Plaintiff was removed from and regularly denied reentry into the skilled trades program because of a policy of handicap discrimination maintained by Defendant, CHRYSLER CORPORATION, since at least the year 1987 and actual handicap discrimination.

61. As a result of the aforesaid false statements and resulting disciplinary record Plaintiff is suffering immediate and irreparable harm. His job is in jeopardy. His reputation among Chrysler management and other employees is being ruined. His hopes of reentering the skilled trades program are being quashed.

62. As a direct and proximate result of the acts of the Defendant, CHRYSLER CORPORATION, plaintiff has suffered and will continue to suffer damages, including but not

limited to: loss of wages, loss of benefits, mental and suffering, loss of self esteem, loss of reputation, attorney fees necessary to prosecute this action and loss of community respect.

WHEREFORE, plaintiff requests that this court enter judgment for plaintiff and against defendant in an amount established by the proofs, together with costs, interest and actual/reasonable attorney fees.

FURTHER, plaintiff requests such equitable relief to which he is entitled, including an injunctive order requiring Chrysler to readmit Plaintiff into the skilled trades program.

/s/_____

GREGORY T. ZALECKI (P27900)
Attorney for Plaintiff
30500 Van Dyke Ave., Suite 704
Warren, Mi. 48093 (810) 573-2600

Dated: October 22, 1996

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[April 23, 1997]

DALE FURBY,
Plaintiff,
v.

Case No. 95-75956
HON. PAUL D. BORMAN

AL WHITE, OLIVER COLEMAN, BILL KENNEDY, FRANK PITONYAK and CHRYSLER CORPORATION,
Defendants.

_____/

GREGORY T. ZALECKI (P27900)
Attorney for Plaintiff
30500 Van Dyke Avenue, Suite 704
Warren, MI 48093
(810) 573-2600

GREGORY S. MUZINGO (P29914)
MARGARET A. SUMA (P34373)
Office of the General Counsel
Chrysler Corporation
Attorney for Defendants
1000 Chrysler Drive
Auburn Hills, MI 48326-2766
(810) 512-4088

_____/

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[Excerpts]

By: **GREGORY S. MUZINGO (P29914)**
MARGARET A. SUMA (P34373)
Office of the General Counsel
Chrysler Corporation
Attorneys for the Defendants
1000 Chrysler Drive
Auburn Hills, MI 48326-2766
(810) 512-4088

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3. Plaintiff's Claims of Violation of the MHCRA Should Be Dismissed Either Under Res Judicata and/or Collateral Estoppel or the Statute of Limitations

In Furby 1, Plaintiff alleged that Defendant Chrysler

violated his right under the MHCRA.[5] Following oral argument, the court dismissed Plaintiff s claim because it was filed outside the applicable statute of limitations. Plaintiff s claims in the present action are identical and should be dismissed either under the doctrine of *res judicata*, or as barred by the applicable statute of limitations.

The elements of *res judicata* are essentially the same under either Michigan or Federal law. However, under Michigan law, a dismissal for failure to comply with the statute of limitations is not deemed an adjudication on the merits while under F.R.C.P. 41(b) it is. Although Defendants argue that this court should apply F.R.C.P. 41(b) to the present case to dismiss Plaintiff's claims, dismissal is also appropriate as to those incidents alleged to have occurred prior to the dismissal of Plaintiff's Wayne County action (Furby 1) for failure to comply with the statute of limitations. Although not reprinted here, the arguments raised by Defendant Chrysler in Furby 1 are applicable here, and incorporated herein by reference. (See Brief in Support of Chrysler's Motion to Dismiss attached as

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[5]Count IV of the Complaint alleges that Chrysler practices "a policy of discrimination." A review of the allegations contained therein reveals simply a rehash of the allegations that concern discrimination and retaliation as set forth in Furby 1 and as contained in Count II of this Complaint. More precisely, the allegations set forth in Count IV do not allege any facts that support any claim that is separate and independent from the discrimination claim advanced and rejected in Furby 1 and as recast here in Count II. Accordingly, Count IV is subsumed in the other claims of discrimination as set forth in this Complaint, as well as those rejected by the Court in Furby 1, and therefore does not state an independent cause of action recognized either in law or common sense.

Exhibit 3 and Defendant's Brief on Appeal attached as Exhibit 45).

Similarly, Plaintiff is, in fact, collaterally estopped from pursuing in this action, claims he pursued or could have pursued, in Furby 1. Under Michigan law, collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties, when the prior proceeding culminated in a valid judgment and the issue was actually and necessarily determined in the prior proceeding. Bullock v. Huster, 209 Mich. App. 551, 552 N.W.2d 202, 204 (1994), citing.Schlumm v. Terrence J. O'Hagan, PC, 173 Mich. App. 345, 354, 433 NW2d 838 (1988). See also Board of County Road Commissioners for the County of Eaton v. Schultz, 205 Mich. App. 371, 521 N.W.2d 847, 850 (1994); Alterman v. Provizer, Eisenberg, Lichtenstein & Pearlman, PC, 195 Mich. App. 422, 491 N.W.2d 868, 869 (1992). Thus, collateral estoppel "serves the important function in resolving disputes by imposing a state of finality to the litigation. By putting an end to litigation, the preclusion doctrine eliminates costly repetition, conserves judicial resources, and eases fears of prolonged litigation." Lumley v. Board of Regents for the University of Michigan, 215 Mich. App. 125, 544 N.W.2d 692, 695 (1996). The ultimate issue in the second action must be the same as that in the first. Detroit v. Qualls, 434 Mich. 340, 357, 454 N.W.2d 374 (1990). The issue must have been necessarily determined -- that is, essential to the resulting judgment -- in the first action. Id. It also must have been actually litigated -- that is, put into issue by the pleadings, submitted to the trier of fact. VanDeventer v. Michigan National Bank, 172 Mich. App. 456, 463, 432 N.W.2d 338 (1988). The parties must have had a full and fair opportunity to litigate the issue in the first action. Kowatch v. Kowatch, 179 Mich. App. 163, 168, 445 N.W.2d 808 (1989).

Applying these standards, Plaintiff is collaterally estopped from arguing his discrimination/retaliation that were necessarily determined in Furby 1. Judge Giovan has already

held that the events giving rise to these claims occurred outside the applicable statute. This conclusion necessarily flows from the following logical construct of undisputed facts: (1) Judge Giovan determined Plaintiff's MHCRA claims were barred by the applicable three-year period of limitations, see Exhibit 25; (2) in so holding, Judge Giovan necessarily determined all of the events establishing the factual elements of the MHCRA claims occurred more than three years before the filing of the instant Complaint; and (3) Plaintiff's MHCRA claims in the instant case are based on the same underlying factual elements and events that were present in Furby 1.

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APPENDIX H

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

DALE FURBY,

Plaintiff,

-vs- Case No. 95-75956
Hon. Paul D. Borman

AL WHITE, OLIVER COLEMAN,
BILL KENNEDY, FRANK PITONYAK and
CHRYSLER CORPORATION

Defendants.
_____/

GREGORY T. ZALECKI (P27900)
Attorney for Plaintiff
30500 Van Dyke Ave., Suite 704
Warren, Mi. 48093
(810) 573-2600 (810) 573-7202 (FAX)

GREGORY S. MUZINGO (P29914)
MARGARET A SUMA (P34373)
Office of the General Counsel
Chrysler Corporation
Attorney for Defendants
1000 Chrysler Drive
Auburn Hills, 48326-2766
(810) 512-4088 (810) 512-4885 (FAX)
_____/

AFFIDAVIT OF DALE FURBY

STATE OF MICHIGAN)

) SS.
COUNTY OF MACOMB)

DALE FURBY, being first duly sworn, deposes and says that if called as a witness he can testify from personal knowledge as follows:

Re: Chrysler's Statement of Undisputed Material Facts

1. (2) I did not perform my job carelessly on August 24, 1979. The job that I was working on on that day was set up dangerously by another. The incident occurred occurred approximately 18 years ago.
2. (3) The September 6, 1979 written warning for failure to return to work on time from a break resulted from a miscommunication from my supervisor. The supervisor did not tell me that I was on an early break or give me adequate instructions regarding break times.
3. (6) While I was in the Chrysler apprenticeship program I had no difficulty following or remembering instructions and my mechanical comprehension was good.
4. (7) Running a drill press backwards is the proper way to line up a drill bit with the spot where the hole is to be drilled. I was taught this during my skilled trades classes in college. I was not having difficulty in the skilled trades program in February, March or July 1987 or at any other time.
5. I was told by Chrysler toolmaker that I was all done in the apprenticeship program in March 1987 and that I would never make it period.
6. (10) The statement that I did not know the basics of my skilled trade in March 1991 is a false statement. The supervisor based his conclusion upon an answer received after asking a very vague question. The supervisor did not give me sufficient information to understand the nature of the question he wanted answered.

7. (11) The May 9, 1991 allegations that my performance levels in quality of work, work output, safety attitude and general attitude were less than satisfactory and that I was reluctant to listen to instructions, reacted to direction in an argumentative manner and that I did not demonstrate a level of knowledge commensurate with my time in the apprenticeship program are false. These false allegations are general and vague. The May 9, 1991 Performance Review contains only general conclusions. It is devoid of any specific allegations of incompetence because none existed. It is also inconsistent with the depositions of Christos Caplanis, Dougals Wargo, and Glen Ford indicating that I performed satisfactorily in the skilled trades program.

8. (12) As indicated above I performed satisfactorily while an apprentice in the Chrysler skilled trades program. I disagree with the statements contained in exhibits A-K to Exhibit 3 of Chrysler's Brief in Support of Motion for Summary Judgment suggesting that I was not a competent apprentice. When the monthly reports relating to my performance in the skilled trades program are evaluated in their entirety they indicate that I was performing acceptably. Chrysler has omitted a number of these monthly reports (see exhibit 10 of plaintiff's brief). Further witnesses Caplanis, Ford, and Wargo have testified that I performed acceptably in the skilled trades program. See the deposition references contained within plaintiff's brief. Caplanis testified that of the vast number of apprentices whom he has observed in the skilled trades program he knows of only one other person disqualified form the program - for having long hair. He also indicated that one person who was disqualified successfully obtained reentry into the program, contrary to the assertions of Chrysler that the union contract forbids reentry into the program after disqualification. It appeared to me that after I was

accused of being overly nervous (see Chrylser's exhibit A to exhibit 3) false information began appearing in my employment records regarding my competency. The March 1991 monthly report (exhibit E to Chrysler's exhibit 3) states that I did not know the basics. This is a false statement. I did know the basics of my skilled trade. That record shows that I worked 72 hours in skilled trades during March 1991. I worked less than two weeks in the skilled trades that month because I had just been recalled into the skilled trades after my layoff in 1987. There is no way that new supervisor Dutka could have accurately rated my abilities within this period of time, especially since I had been out of the skilled trades since July 1987 - almost four years. His attempt to rate my abilities as inadequate without having sufficient information suggests that there was indeed a plan to remove me from the skilled trades program based upon supervisor McNeil's prior concerns that I was overly nervous (January 87 evaluation - exhibit A to exhibit 3). During the time that I was in the apprenticeship program I performed competently. I remembered and followed directions. I had sufficient mechanical comprehension to do the job satisfactorily. I paid attention to my supervisors. I satisfactorily remembered and applied the new skills which I was learning. I produced the work output expected of me. I was able to properly perform the tasks expected of me. My work quality was not substandard. I performed my work in a safe manner. I took my work seriously and worked very hard to attain journeyman status. I communicated well with my coworkers and superiors. I had no difficulty catching on to the new skills which I was expected to learn. I never injured seriously myself or a coworker during the course of my apprenticeship. I understood fractions and decimal sizes and their relationship to solid objects. I understood the blueprints

that I worked with.

9. (12) I performed my duties as an apprentice in the skilled trades satisfactorily.

10. (13) I was not fairly represented by the union in my attempt to obtain reentry into the skilled trades program. The union acted as if it had made a decision that it did not want me in the program.

11. (15) Nate Gooden, who wrote the June 9, 1993 letter attached as exhibit 6 to Defendant's brief, has, to the best of my knowledge, no first hand knowledge as to how I performed as an apprentice. He never observed my performance as an apprentice.

12. *** (16) I did not perform poorly while an apprentice.

13. (17) I was not at the Utica post office when Frank Sabo said he saw me there in February 1994. I never left my job during working hours to go to the Utica post office in February 1994. Frank Sabo was not my supervisor at that time. My supervisor never indicated that he had noticed that I was away from the job on that day during working hours.

14. (18) The Wayne County Circuit Court case against the union was based upon the theory that the union was directly involved in the decision making process which resulted in my being removed from the skilled trades program.

15. (19) I did not refer to Al White in a racially derogatory manner on August 14, 1994.

16. (20) Neither did I refer to Oliver Coleman in a racially derogatory manner during August, 1994.

17. (21) During August, 1994 I did not intimidate, coerce or use abusive language toward others with racial overtones. Nor did I act in a bizarre manner or do anything to endanger myself or my fellow employees. Although I challenged the accuracy of these allegations Chrysler never gave me an opportunity to defend myself at any type of a hearing designed to determine the truth

of the allegations. My union provided no assistance to me in my attempt to refute these charges. Instead the union seemed to assume that the charges were true.

18. (22) The question of when Chrysler was made a party to the Wayne County Circuit Court suit is presently pending before the Michigan Court of Appeals.

19. (23) Defendant's Exhibit 17 shows that the August 26, 1994 discrimination charge was filed with both the EEOC and the Michigan Department of Civil Rights.

20. (24) The statements regarding Dr. Schwartz' diagnosis are contained in Defendant's exhibit 18 are not the statements of Dr. Schwartz. That document contains multiple hearsay within hearsay and is not sworn to. I saw Dr. Schwartz for a total time of approximately 20 minutes. He appeared to have a preexisting relationship with Bernice Washington, the Chrysler EAP representative who wanted me treated. He appeared to be telling Bernice Washington what she wanted to hear. At the time that I saw Dr. Schwartz I was not out of touch with reality and I was mentally fit for work. I don't believe that exhibit 18 accurately reflects what Dr. Schwartz told Bernice Washington.

21. (25) I did not tell A.A. Iacobelli on September 26, 1994 all of my preliminary assessments concluded that inpatient treatment would be required. In fact, after Chrysler took the position that it would not let me return to work without a doctor's statement indicating that I was fit to return I did obtain such a statement from Dr. Benenson. I did not think that I was in need of psychiatric treatment during the months of August, September and October 1994. Nevertheless Chrysler would not let me return to work until I received psychiatric clearance. During that time period I had employer provided medical insurance which would provide coverage for psychiatric care and hospitalization if it were needed. I was put in touch

with a number of mental health treaters who were on the Chrysler list of authorized treaters. It seemed to me that most of the treaters on this list were eager to treat me because of the financial benefits available to them. Some even diagnosed me as needing treatment after a telephone interview and without the benefit of an in office examination or conference. I ultimately decided to be examined by Dr. Benenson, at my own expense, in order to comply with Chrysler's requirement that I have a psychiatric clearance in order to return to work. By hindsight it appears to my that those treaters on the Chrysler approved list had a conflict of interest resulting in their willingness to say whatever Chrysler or the UAW wanted them to say in order to maintain their status on the approved list of providers. They also appeared to be overly eager to provide services when they learned that I was insured through my employment at Chrysler.

22. (29) The EEOC did not make a determination in favor of any party with respect to my January 9, 1995 complaint. See Exhibit 11 to Plaintiff's brief.

23. (31) The orders entered dismissing the Wayne County Circuit Court case were timely appealed by right to the Michigan Court of Appeals. That Court has not yet issued a decision.

24. (32 33) On January 27 and/or 29, 1996 I did not report to work late and I did not walk off of my job. On January 27 and/or 29, 1996 I did not report to work late. I was not insubordinate and I did not leave the line without permission. On both days I reported to my work area on time. This should be supported by Chrysler's computer records which track the time when an employee enters the plant. An employee is required to pass a computer encoded card through a card reader at the plant entrance. When the card is passed through the reader the employee's entrance time is recorded and

the turnstiles open to allow entrance into the plant. These records should show that I typically enter the plant before the beginning of my shift. I have noticed that the gate time is a few minutes faster than the shift starting times. In other words the gate time may indicate the time as midnight but the start of the midnight shift within the plant is actually a few minutes later. For example, if the gate clock indicates 12:02 am, the plant clock would indicate 12:00 am at the same time. I believe the Ellwart and Allen (both supervisors) depositions support my position that I was on time for work and they failed to assign a job to me. As I recall each thought that the other had assigned a job to me. I was not assigned a job on that day at the start of the shift although I was in the appropriate area at the beginning of the shift.

25. (34, 35, 36) During March 1996 I regularly reported to the line on time. On March 23, 1996 I reported to the line on time. On March 27, 1996 I reported to the line on time. I did not refuse to follow my supervisor's instructions and I did not leave the plant without permission. The gate entry time records, described above, should support my position. I never made threatening facial expressions toward Mr. Morosky nor did I ever intimidate him..

26. (37) The April 26, 1996 and May 5, 1996 discrimination complaints were filed with the Michigan Department of Civil Rights and the EEOC.

27. (38) I vehemently denied the allegations leading up to my March 27, 1996 suspension. I received very little union support in contesting the charges - probably because I have an ongoing suit against them. I never had an opportunity to contest the charges. Chrysler assumed them to be true and proceeded accordingly. It was made clear to me that if I did not sign the conditional reinstatement agreement that I would

probably be without a job for a long period of time - possibly up to two years. I was very upset that this agreement required me to give up my right to a grievance concerning the underlying charges and that Chrysler was apparently able to place false allegations as fact in my employment records. When Chrysler attempted to use this same procedure again in order to resolve false allegations against me in December 1996, I refused to give up my grievance rights again. I refused because the charges were untrue. As a result I have been without a stable full time job since December 1996. Chrysler was willing to give me my job back in December, 1996 if I allowed it to place false factual allegations in my employment file and gave up my right to contest those charges by way of a grievance. As a result of the December, 1996 disciplinary action I have lost my regular wages since that time, approximately two weeks of paid December holiday pay and a profit sharing payment in believed to be in excess of $8000.00 net. In order to be entitled to the profit sharing payment an employee was required to be on the active employment roll as of December 31, 1996.

28. (40-43) On October 3, 1996 I did not operate a blanker machine in an unsafe manner. No fellow employee ever told me that I was operating the blanker machine in an unsafe manner. I did not refuse to follow a supervisor's order and I did not leave my work area without authorization. On the day in question I was doing what I was supposed to be doing on the job. This is another instance of Chrysler making false allegations in order to make me look bad. The union was again unwilling to assist me in contesting these false charges. I signed another document giving up my grievance rights in order to retain my job. I was upset that I had to give up my right to contest the charges by way of a grievance in order to get my job back.

29. (45-47) I did not report to the line late on December 6, 1996. I did not become agitated and begin to yell when instructed where to work. After I was suspended I was again offered my job back if I gave up my right to file a grievance. The pattern that Chrysler was employing became clear to me. Chrysler made false allegations against me in March and October of 1996 and suspended me based upon those allegations. Chrysler never gave me an opportunity to contest those charges. I was required to give up my right to file a grievance in order to get my job back. Although I got my job back after these suspensions my employment record referred to the false allegations as fact. It became clear to me that these false factual allegations would significantly impair my ability to obtain reentry into the skilled trades program. I just couldn't go along with another episode of allowing the false allegations to stand without being contested. I refused Chrysler's offer to get my job back in exchange for giving up my grievance rights. I am hopeful that an arbitrator will recognize the impropriety of Chrysler's actions should this matter ever come to binding arbitration. Although it hurts me not to have a job at this time, the right thing to do, in my opinion, is to contest Chrysler's history of making false allegations against me. On March 18, 1997 the Michigan Employment Security Commission, after a contested hearing, determined that I was not guilty of employment misconduct and reinstated my unemployment benefits. Also please refer back to paragraph 26 for further details, including a summary of the financial losses caused by the termination of my employment. I believe that the December 1996 discharge is a wrong covered by my first amended complaint.

Re: The Amended Complaint

30. On or about August 13, 1994 and/or August 14, 1994 AL WHITE falsely accused DALE FURBY of

making racially derogatory remarks in the work place at CHRYSLER CORPORATION. The statement(s) was(were) substantially as follows: AL WHITE accused DALE FURBY of calling AL WHITE a big black nigger (or a big fat nigger). Additionally, DALE FURBY was falsely accused of saying, in reference to AL WHITE, "There's that big fat nigger whose been causing all the problems." In the alternative, said false statement(s) was(were) made and/or repeated by BILL KENNEDY and/or FRANK PITONYAK. The statements also have been reported to be as follows: "There's that big fat black nigger whose been causing all the problems" and "The big black fat nigger is lying on him"

31. On or about August 22, 1994 OLIVER COLEMAN falsely accused DALE FURBY of making racially derogatory remarks in the work place at CHRYSLER CORPORATION. The statement was substantially as follows: OLIVER COLEMAN accused DALE FURBY of saying "why are all you black mother fuckers sitting on your ass." This statement was caused to be placed within Plaintiff's employment file and repeated by BILL KENNEDY and/or FRANK PITONYAK.

32. On or about August 13, 1994 and thereafter BILL KENNEDY and FRANK PITONYAK falsely accused DALE FURBY of having dangerous work habits and making racial slurs during the course of his employment at CHRYSLER CORPORATION.

33. On or about August 13, 1994 and thereafter BILL KENNEDY and FRANK PITONYAK falsely accused DALE FURBY of coercing and intimidating, as well as being abusive toward, fellow employees during the course of his employment at CHRYSLER CORPORATION.

34. Each of the statements referred to above were false. My

information concerning the nature of the alleged racial slurs is based upon the records of Chrysler and the accusations which were made against me.

35. The aforesaid false statements were published and disclosed to coworkers and union representatives of Plaintiff as well as supervisors and other management personnel of CHRYSLER CORPORATION.

36. The aforesaid false statements were made a part of Plaintiff's personnel record and other corporate records at CHRYSLER CORPORATION.

37. Plaintiff is and has been desirous of obtaining a position in skilled trades at CHRYSLER CORPORATION.

38. Because the false statements referred to above have been made part of Plaintiff's records at CHRYSLER CORPORATION his ability to pursue and obtain a skilled trades position has been severely impaired.

39. The false statements referred to above were made by employees of CHRYSLER CORPORATION during working hours.

40. During August 1994 Plaintiff was discharged (later changed to a suspension and medical leave) from his employment at CHRYSLER CORPORATION for allegedly making the aforesaid racial slurs.

41. As a result of said false statements Plaintiff was forced to obtain medical treatment which has made it appear that he has certain mental problems which he does not have. Such information has been placed within Plaintiffs' records at CHRYSLER CORPORATION and is also false.

42. As long as said false statements are a part of Chrysler's personnel and labor records Plaintiff will be suffering irreparable harm.

COUNT II - RETALIATION AND DEFAMATION

43. Plaintiff has previously pursued perceived handicap discrimination (hereinafter referred to as handicap

discrimination) and racial discrimination claims, as well as NLRB claims, against Defendant, CHRYSLER CORPORATION, for which retaliation is prohibited by law, which include:

a) a handicap discrimination claim filed during December 1991 (all dates referred to herein are approximate) with the Michigan Department of Civil Rights (MDCR), relating to Plaintiff's dismissal from the Chrysler skilled trades program;

b) a handicap discrimination and retaliation (relating to handicap and racial discrimination) claim filed in the Wayne County Circuit Court during June 1994;

c) handicap and racial discrimination claims, filed with the EEOC and the MDCR, relating to Plaintiff's August 1994 suspension based upon false allegations that plaintiff used racial slurs; and

d) the complaints contained within Exhibit 11 of Plaintiff's brief.

44. Plaintiff's right to pursue these claims without retaliation from his employer Chrysler Corporation is protected by MCL 37.1602 and MCL 37.2701.

45. Certain Chrysler management employees, including James Dyckman, have pursued a common plan which entails the creation of a progressive disciplinary record against the Plaintiff which is based upon false allegations of wrongdoing.

46. Plaintiff has always been a good worker for Chrysler and he has an excellent attendance record throughout the course of his employment.

47. Defendant, Chrysler Corporation's, retaliation against the Plaintiff includes the following:

a) On or about 2/28/94 Plaintiff was falsely accused of being out of the plant during working hours and given a one day suspension.

b) During August, 1994 Plaintiff was falsely accused of making racial slurs (as described in Count I) and given a three day suspension. The suspension was subsequently converted to a medical leave based upon the false allegation that Plaintiff was mentally unstable. As a result of this involuntary leave Plaintiff lost considerable wages and was not allowed to work for approximately 8 ½ weeks.

c) On or about October 29, 1995 Plaintiff was given a verbal warning for allegedly being late for work, when in fact he was there on a timely basis.

d) On or about January 29, 1996 Plaintiff reported for overtime work. Plaintiff waited to be assigned to a job. When it appeared that there was no work for Plaintiff to perform, he asked to be sent home without pay. Chrysler never did assign Plaintiff to a job on that day. Plaintiff was then suspended for four days based upon false allegations of "Reporting to the line late, insubordination and, and leaving the line without permission."

e) On or about March 27, 1996 Plaintiff reported for work as a press operator. Again Plaintiff waited to be assigned a job, but was never assigned a job. Plaintiff tried to have a job assigned to him unsuccessfully. Plaintiff was then given another disciplinary suspension based upon the false allegations of "1)

Unexcused tardiness (late reporting to line); 2) failure or refusal to follow instructions of supervision; and 3) leaving the plant during working hours without permission." Plaintiff was forced to sign a statement putting him on probation for one year and waiving any right to file a grievance by threats that he would lose his job immediately if he did not sign the statement.

f) Plaintiff has regularly been assigned to work in unsafe working conditions.

g) Chrysler continues to maintain records falsely indicating that Plaintiff is not qualified for the Chrysler skilled trades program.

h) On or about October 3, 1996 Plaintiff was suspended for "refusing to follow a supervisor's instructions; working in an unsafe manner; and leaving his assigned work area without authorization." The suspension lasted until October 14, 1996. The suspension was without basis in fact.

i) On December 12, 1996 I was terminated from my employment at Chrysler for allegedly being late getting to the line. I was not late getting to the line. I was where I was supposed to be at the beginning of my shift.

48. Plaintiff's labor union has failed to take anything but perfunctory and useless steps toward correcting Chrysler's false allegations against Plaintiff.

49. With respect to the false allegations pertaining to Plaintiff and referred to above, Plaintiff has never been given a hearing, informed of the exact basis for the charges, given an opportunity to confront his accusers, given an opportunity to fully explain his version of the events to Chrysler, nor has he been given a fair opportunity to contest the charges. Further, Chrysler

has never held any type of a hearing to determine if the charges were in fact true.

50. Plaintiff is desirous of obtaining reentry into the Chrysler skilled trades program.

51. The accusations against Plaintiff are false and defamatory. The records which Chrysler maintains pertaining to the allegations made against Plaintiff are false and defamatory.

COUNT III - EXPUNGEMENT OF EMPLOYMENT RECORDS

52. MCL 423.501 et. seq. prohibits an employer from maintaining information known to be false in an employees personnel records.

53. Defendant, Chrysler Corporation, is maintaining the following false information within Plaintiff's personnel records:

a) information pertaining to the five disciplinary suspensions/medical leaves referred to above as well as information pertaining to my discharge in December 1996;

b) information indicating that plaintiff is not qualified to be involved in the skilled trades program at Chrysler; and

c) information indicating that Plaintiff has a mental problem affecting his ability to perform his job as well his ability to successfully complete the skilled trades program.

COUNT IV - POLICY OF DISCRIMINATION

54. Defendant, CHRYSLER CORPORATION, perceives Plaintiff, DALE FURBY, to have a handicap as indicated by the notes contained within my apprentice evaluations (Exhibit 11 to plaintiff's brief) and my forced medical leave during August 1994.

55. In the alternative, although Plaintiff believes he does not have a handicap, the proofs may establish that he

does have a handicap and/or that he may need accommodation for purposes of employment. Such accommodation would not impose an undue hardship upon Defendant, CHRYSLER CORPORATION, and would require that CHRYSLER provide a fairly accepting, benign, and supportive work environment to Plaintiff.

56. The perceived or actual handicap referred to above is general anxiety disorder and/or the status of being overly nervous and/or adjustment reaction with anxious mood and/or emotional impairment.

57. The perceived or actual handicap referred to above is unrelated to Plaintiff's ability to perform his present job and the jobs at Chrysler known as skilled trades.

58. Plaintiff, DALE FURBY, is qualified to perform as an apprentice in all of the skilled trades programs offered at Chrysler Corporation and, in particular, the skilled trades known as toolmaker J & F, die maker, millwright, electrician and machine repair.

59. Plaintiff, DALE FURBY, was previously removed from the skilled trades apprenticeship program at Chrysler Corporation, during June 1991, for the alleged reason that he was not qualified for the position.

60. Such reason was false.

61. Since Plaintiff's removal from the skilled trades program, he has regularly and continuously sought reentry into the program.

62. Plaintiff was removed from and regularly denied reentry into the skilled trades program

63. As a result of the aforesaid false statements and resulting disciplinary record Plaintiff is suffering immediate and irreparable harm. His job is in jeopardy. His reputation among Chrysler management and other employees is being ruined. His hopes of reentering the skilled trades program are being quashed.

64. As a direct and proximate result of the acts of the Defendant, CHRYSLER CORPORATION, plaintiff has suffered and will continue to suffer damages, including but not limited to: loss of wages, loss of benefits, mental and suffering, loss of self esteem, loss of reputation, attorney fees necessary to prosecute this action and loss of community respect.

Re: Facts Alleged Within Brief

65. Dale Furby began pursuing his career goals at Chrysler in 1972. He started working at Chrysler as a factory laborer. He had a very good attendance record and always worked hard. He was thought of as a good worker by his supervisors.

66. Dale Furby was an ambitious person and wanted to better himself with Chrysler. He applied for and was accepted into the Chrysler skilled trades program as an apprentice. He entered the toolmaker - jig and fixture apprenticeship program in 1986. This program required approximately 8000 hours of work as an apprentice and extensive schooling.

67. Subsequent to his removal from the Chrysler skilled trades program, Mr. Furby has pursued educational goals to further qualify him for reentry into the skilled trades program. He has obtained three associate degrees at Henry Ford Community College and Macomb County Community College. The community colleges also offer certificate programs relating to the various skilled trades. Upon successful completion of a group of courses relating to specific skilled trades, the community college awards a student a certificate for that skilled trade. Dale Furby has obtained five of these certificates. They are for the fields of tool and die making, drafting and mechanical design, pattern and model making, machine repair and mold making.

68. At one time someone associated with the skilled trades program at Chrysler suggested to Mr. Furby that he was

not entitled to tuition reimbursement for his involvement in the skilled trades college courses. Mr. Furby voluntarily, without request or suggestion by Chrysler, repaid Chrysler for this tuition in the amount of approximately $2500. Chrysler had paid this sum in accordance with its general tuition reimbursement program available to most of its employees.

69. Shortly after the Wayne County Circuit Court suit was dismissed and this suit was started a string of disciplinary actions were taken against Mr. Furby by Chrysler Corporation as detailed within paragraph 34 of plaintiff' amended complaint.

70. Since the filing of the amended complaint herein, Chrysler Corporation has engaged in a further retaliatory act by discharging Plaintiff from his job on December 6, 1996.

71. A review of paragraph 34 of Plaintiff's Amended Complaint discloses a number of specific instances of alleged retaliation. Each of the alleged retaliatory acts which resulted in employment suspensions (August 1994, January 1996, March 1996, October 1996 and the December 1996 discharge) involved labor relations supervisor James Dyckman. The August 1994 suspension involved supervisors Kennedy and Pitonyak. The October 1995 incident involved supervisor Elwart. The January 1996 suspension involved supervisors Allen and Elwart. The March 1996 suspension involved supervisor Morawski. The assignments to work in unsafe working conditions were made by supervisor Allen. The October 1996 suspension involved supervisor Crabtree. The December 1996 discharge involved supervisors Gillenwater, Bishop and Stanley S. (last name unknown). Supervisors McNeill and Gaastra were involved in removing Plaintiff from the skilled trades program.

72. The depositions of the following Chrysler employees

were taken on the dates indicated: McNeill (4/11/95), Gaastra (4/7/95), Plaintiff (12/13/94, 7/31/96, 8/13/96 and 8/15/96). White (10/15/96), Coleman (10/14/96), Dyckman (10/15/96) Kennedy (10/15/96) and Pitonyak (10/15/96).

73. Prior to Plaintiff's filing of his discrimination complaints he was a good hard working employee of Chrysler with a superior attendance record (****).

74. Shortly after the dismissal of Plaintiff's Wayne County suit (October 1995), the subsequent appeal (November 1995), the filing of this suit (served during November 1995) and the April 1996 Michigan Department of Civil Rights complaint Plaintiff was charged with numerous work related offenses by Chrysler. Most of these appear within paragraph 34 of Plaintiff's amended complaint. The common thread throughout is that the discipline was based upon false accusations and was imposed without allowing Furby an opportunity to challenge the accusation and confront his accuser.

75. In March 1996 and October 1996 Furby was forced to sign a document giving up his rights to a grievance in order to get his job back. When this scenario presented itself again in December 1996 Furby elected not to give up his grievance rights.

76. As he feared, this failure to give up his grievance rights cost Plaintiff his job that he had with Chrysler since 1972. The act of wrongdoing leading to the termination of Plaintiff's employment alleged by Chrysler is that Plaintiff was late reporting to the line by a matter of seconds - which plaintiff denies.

77. James Dyckman was the labor relations supervisor in charge of all of Plaintiff's disciplinary suspensions. Mr. Dyckman's job was to determine the extent of discipline to be imposed for the alleged wrongdoing if there was in fact wrongdoing.

78. A number of Plaintiff's supervisors made statements

indicating an intent to retaliate against Plaintiff because of his protected conduct. The first comment was made in 1987 by skilled trades supervisor McNeill. That statement tends to show that McNeill wanted Furby out of the skilled trades program because of some type of personal vendetta. McNeill stated "We have to get rid of that guy" while pointing his finger at Plaintiff. During June 1991 Christos Caplanis stated to plaintiff "Now that you are out, try to get back in." Mr. Caplanis appeared to suggest that Chrysler and the joint committee had attained its goal of removing plaintiff from the skilled trades program after creating a false record suggesting incompetency on the part of plaintiff. During February 1994 supervisor Bill Kennedy, during the course of suspending me from my employment, said "let's use this guy as guinea pig." Mr. Kenndey appeared to be suggesting that a plan existed to make false accusations against me. This occurred within two months after Dr. Goldstein's December 1993 report was submitted to Chrysler. In 1993 supervisor Al Dukus told Plaintiff (in reference to his discrimination complaints) that he "will screw somebody up" and that he "will get into a lot of trouble." At that time Plaintiff was doing nothing wrong. Again, in 1994, when Plaintiff was doing nothing wrong, supervisor Kennedy told Plaintiff that he "better straighten out or that Chrysler is going to get rid of him." This appeared to be in reference to Plaintiff's discrimination complaints. On August 13, 1994 supervisor Kennedy told Plaintiff not to "get on the wrong side of him" or Kennedy "will make sure that [Plaintiff] gets fired." It appeared that Kennedy was referring to Plaintiff's prior discrimination complaint. In 1993, shortly after Plaintiff filed an EEOC\MDCR complaint he was confronted by supervisor Dukus. He suggested that Chrysler does not have to recognize any of Plaintiff's privileges. Dukus

was suggesting that if Plaintiff was away from his work area because he went to the restroom, he would be charged for being away from his designated work area. Dukus was also suggesting that if the union did not back up Plaintiff, Chrysler would mistreat him more. During late 1995 supervisor Elwart told plaintiff that "you better straighten up or you will end up on the street. You have a bad record." It appeared that Elwart was referring to Plaintiff's prior discrimination complaints. Plaintiff was doing nothing else wrong at the time. On or about September 20, 1995 labor relations supervisor Dyckman warned Plaintiff that he "had better not hire an attorney" to pursue his employment complaints. Furby nevertheless did hire an attorney and this suit was served on Chrysler during November 1995.

79. In 1996 Furby was suspended from his employment at least four times and ultimately terminated.

80. Furby's administrative agency discrimination complaints are contained within his employment file which has been produced by Chrysler (Exhibit 11).

81. Chrysler's accusations that Furby has been incompetent as an apprentice and guilty of employment wrongdoing since his removal from the skilled trades program are false accusations. Furby was never given an opportunity to contest the accusations. He was forced to give up his grievance rights with respect to the March and October 1996 accusations in order to get his job back.

Re: Exhibits

82. Exhibit 1 is a copy of the first amended complaint presently pending in this court.

83. Exhibit 2 is the first amended complaint filed with the Wayne County Circuit Court.

84. Exhibit 3 is defendants' answer to the first amended complaint filed with this Court.

85. Exhibit 4 are the Wayne County Circuit Court orders

dismissing plaintiff's suit.

86. Exhibit 6 are excerpts from the Christos Caplanis (apprentice coordinator) deposition.

87. Exhibit 7 contains records I received from the EEOC which were a part of Chrysler's response to one of my civil rights complaints; they indicate that Joseph Kruemmer was involuntarily removed from the Chrysler skilled trades program and later reinstated.

88. Exhibit 9 contains excerpts from the Glen Ford (skilled trades supervisor) deposition.

89. Exhibit 10 contains my monthly skilled trades evaluations from Chrysler and my letter of protest wherein I sought reentry into the program.

90. Exhibit 11 contains copies of my administrative agency discrimination complaints and records indicating dispositions of those complaints.

91. Exhibit 12 contains copies of records I received from the EEOC which were provided to the EEOC by Chrysler.

92. Exhibit 13 contains a report prepared by Dr. Samuel Goldstein, Ph. D., after he interviewed me and a report from Dr. Alan Benenson, who treated me.

Re: Requests for Reinstatement

93. I have continuously sought reentry into the Chrysler skilled trades program since I was removed. These requests include the following:

    e) I filed the civil rights complaints contained within exhibit 11.

    f) I took preapprentice tests through Chrysler during the fall of 1992 and the summer of 1995. I was told that I scored the highest within the plant on spatial relations.

    g) I filed a written application with Chrysler for a skilled trades apprenticeship during November 1992. It remains on file to the best my knowledge.

h) I appealed my removal from the apprenticeship to the National Apprenticeship Committee.

i) I sent letters requesting readmission into the skilled trades program to apprentice representative Chris Caplanis (1994), skilled trades committeeman Bill Aleck (1994), national apprentice committee member and chief steward for the skilled trades bob Barsoti (1994), national apprentice committee member Ron Gosset (1994), national apprentice committee member (Chrysler) Russ Bayly (11/93), national apprentice committee member Mary Ann Morrill (in charge of the apprentice program at Chrysler headquarters - 11/93), international representative Stephen Jones (9/95), Chrysler chairman Robert Eaton (11/93), local union president John Dansky (1994), international representative Larry Leach (1994), local 869 president Carl Dickerson (1994), and the vice president of the UAW international union Stan Marshall (1993)

j) I called Mary Ann Morrill at least two dozen times from 6/21/91 to the time of her death believed to be after 1993. I also called her supervisor Mr. Arthur in 1994 or 1995.

k) I called Russ Bayly several times in 1993 and 1994.

l) I called Ron Gosset many times.

m) I called the Chrysler National Training Center (they taught the preapprenticeship training classes) many times in 1993 and 1994.

n) In 1995 I called Terry McEnvoy who was in charge of the skilled trades education program.

/s/_____
Dale Furby

Subscribed and sworn to before me
this 2nd Day of June, 1997.

/s/_____
Benjamin G. Bair, Notary Public, Oakland County
acting in Macomb County, Michigan
My Commission Expires: 4-13-02

APPENDIX I

[Excerpts from Dale Furby trial testimony of 5/6/99]

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wouldn't be working today.

BY MR. ZALECKI:

Q All right. Did the Conditional Reinstatement Agreement address whether or not your record would be expunged?

A No.

Q Let me ask you this, with respect to December of '96, were you suspended again?

A December of '96? Yes.

Q What job were you working at the time?

A I was in the press room.

Q Who was your supervisor?

A Dale Gilmore. He was taking Nick Morosky's place.

Q What job were you doing? Was it operating presses?

A Yes. I had a specific assigned job that I was more or less supposed to keep track of. I mean, they wanted me to do it every day. They led me to believe that.

Q What happened that led up to your suspension on that day?

A December?

Q Yes?

A I had went up to the job and I got the impression it was going to run because all the people were in place. And so I said, well -- then I asked one of the co-workers, I said, "Is this going to run today, right?" "Yeah." Okay.

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Just go up to the job and be ready to run. And they already told me three days prior to that that they needed a regular guy on it. I goes, "Well, it's no problem. I'll be there. I'm here every day, what do you want? There's no problem. Let's do it." I had already Dale Gilmore that a couple days prior to that. So I just said, "Well, come in, go straight to the job and go to work."

So I was already to go to work and I got my gear on and I'm already start running the machine. And somebody come up to me and he goes, "They assigned me to this job today." And I go, "Well, then I guess what I should do I should find a supervisor and find out what he wants me to do." I mean, I don't know if -- maybe I should have stayed on the job and waited. I don't know. But, I mean, in the meantime, the clock, you know, they might need me somewhere else. So I thought maybe I'll run into him.

So I started walking down the aisleway towards where I thought he might be. And as soon as I got to the end -- almost to the end of the aisleway where the press lines were, and where the press lines went out, and than he came around the corner and he goes, "You're late." I goes, 'What?' I tried to explain to him that I was down there. And, you know, so we went back to the zone office.

I goes -- he says, "I want you to go to the

shooter line, go to line one." Yeah, "Go to line one." So I says, "Okay. Can we talk? Can I talk to the steward? Would you call him, please?" I mean, I just I wanted to find out what the deal is. I'm on a job and I was already on the job working, ready to work and they put somebody in my place, now I'm late getting to the job. How could I be already late when I was always on

the job ready to work. I mean, that don't make any sense.

I mean, like I say, it's like I come down there, maybe he didn't see me or something. But, I mean, you know, they don't got to chase me around the room, I just go to the job and go to work. I mean, I know -- if I already know where I'm supposed to be, then I just went to the job.

Q What was the --

MS. SUMA: Your Honor.

BY MR. ZALECKI:

Q -- accusation of wrongdoing?

MS. SUMA: -- if I could just, for the record, Your Honor, we discussed this in chambers. But again, for the record, I object to any incident outside the Amended Complaint, which was filed in October. There's been no Amended Complaint sought, nothing filed and all of this are events occurring thereafter.

THE COURT: All right.

Your objection is noted.

BY MR. ZALECKI:

BY MR. ZALECKI:

Q What was -- seemed to you to be the major complaint when you were confronted by the supervisor? What was on -- what did he appear to have on his mind?

A That I was late.

Q Were you late?

A No. I was just coming from the job. They put someone in my place and I figured, I had to find a supervisor. He's probably got some job left to work. I mean, I didn't come here to wait for a supervisor -- I mean, I assumed he was going to give me a job. You know, I was already on a job and he put somebody -- assigned somebody to that -- already assigned somebody to the

job I usually run. So I assumed --
Q Well, how long after the scheduled shift start time did you have this confrontation with the supervisor?
A I would say it was within approximately six minutes after 12:00 -- after the scheduled shift start.
Q Okay. And then as a result of this alleged wrongdoing, how much time did you miss from work?
A A week went by before they asked me to come in.
Q How long were you off all together?

A Ten months. After they discharged me.
Q Do you know what was being referred to when in this Exhibit 7(a) it says that you refused the supervisor's instructions?

A I don't -- they wouldn't tell me. I mean, the supervisor told me that they needed somebody to be on that job every day. And I saw the job was running. That's the first thing I thought, "That job was running. I got to go up to that job and go to work."

I mean, I know they already told me to report to his desk, but I mean, since they told me to report to the desk they had -- the supervisor asked me three days before, he goes, "I need a regular man on this job every day." I says, "What's the problem? I'm here every day. Let's do it. I'll be there. I mean, he -- because I remember walking down the aisleway telling him that. And I'm there every day.
Q Did the supervisor explain to you what was meant by leaving the work station?
A They told me I was suspended, so I left the work station.
Q Did this have anything to do with the fact that you testified earlier a co-worker came into your expected job and said it was his job?

A No. He said they had assigned him to that job. So I just walked away. I walked off. I said, "Well, I better get my junk and go find the supervisor. I'm sure he had a job for me." I'm not going to get paid for standing around and do nothing. I was assuming he was going to give me a

job.
Q Did the supervisor ever explain to you whether the leaving the work station allegation referred to that work station where the other employee took over for you?
A No. I believe he was referring to after I had been to line one. They told me I was suspended. So I just said, "Well, if I'm suspended, I'm not going to work," so, you know, I mean. If this happens very often, then I'd better get my junk out of my locker. Because I have to go clean my locker -- I goes "I got to get my stuff out of my locker."
I mean --
Q Did you leave any work station before you were told you were suspended?
A No.
Q Did you ever report to the line late on that day?
A No. I mean, I went straight to this job that I thought I was going to be running every day because I ran it all the time for Nick and Nick -- when Dale said the same thing. He goes, "I need a regular man on it," so I was, "I'll be there every day. Okay."
Q While you were off for the ten months, did you receive any unemployment benefits?
A Yes. It finally caught up to me about --
MS. SUMA: Objection. Objection, Your Honor.
The receipt or non-receipt of the employment benefits from

to work and just like that. And I was getting -- Q When -- exactly when is it that you were suspended?
A It was six days after on the 12th. The suspension occurred on the 6th of December.
Q When was your last day at work in 1996?
A I believe it was on the 6th. Must have been the 6th - - yeah. because that was a weekday. It would be the 6th, the last.
Q And when did you return to work at Chrysler?
A September of 1997. September, I think it was 26th.
Q Did you have to sign a Conditional Reinstatement Agreement to come back?
A Yes.
Q Did you get back pay when you came back to work?
A No.
Q Did you get your record cleared of this allegation when you came back?
A No.
Q What was your understanding as to what would happen if you refused to sign that Conditional Reinstatement Agreement?
A I wouldn't get my job back.
Q And again, the allegation was that you were six minutes late?
A No. You mean six minutes late for work that day? No.

Q Reporting to the line?
A I don't know how late it was when I finally ran into the supervisor. But I knew -- I just assumed he wanted me to go to that job and run it. I mean, the job was running. He just -- I mean, he -- we had already made plans prior to
that. I --

Q You know what? We already covered this --
A
Q -- so I'm going to withdraw that question.
A I mean, I didn't -- I don't remember what time it was when I finally ran into the supervisor. I don't know what -- didn't see -- time that was.
Q Was there a time when you refused to sign a Conditional Reinstatement Agreement?
A
Q
A information ain't true.
Q Was there any profit sharing check that you would been entitled to had you stayed working there until the of the year?
A Yes.
And why did you -- well, when was that?
That was about December 12th, because I told them the have end I get my -- yeah. I would have been entitled to one and within an "X" amount of time. But the way it was arranged is I wouldn't -- it was arranged so I wouldn't be there within the time limits to be eligible. I think you had

to be working there through the 30th of the year. And I wouldn't get it because I wasn't there on the 30th of the -- on the 30th day of the last month of the year.
Q Approximately how much of a profit sharing check did you lose because of this?
A Eight thousand dollars.
Q Did you lose any other profit sharing checks on account of the layoffs that we talked about or the suspensions that we talked about?
A I got -- I lost the next one through another -- this was about $7,375. The next profit sharing because I didn't come back to

work until September. I didn't have enough time in and I wasn't eligible for Christmas pay that year or the year before that.
Q What did Christmas pay amount to?
A Oh, wait a minute. That's right. I did get the Christmas pay the year before. That's right. That was about $625.
Q What year did you miss the $625 of Christmas pay?
A That was 1997 because I didn't -- they wanted "X" amount of -- a certain number of weeks you had to be back on the job and I wouldn't have been there enough weeks to qualify for the -- I missed it by a couple weeks.
Q Just so I'm clear here. The two profit sharing losses that you talked about were for the year 1996 and then the

year 1997?
Yes, sir.
What happened to your medical insurance during the that you were off?

A I got in the mail a bunch of stuff from Medicaid. My medical insurance was done. It was terminated, I guess. didn't try to use it because I figured I'd end up -- Q When was it terminated?
A The day I was terminated from the job, I believe. thought -- I was under the impression it was not there no more.
Q Do you know, can you estimate how much it would cost replace that insurance had you chosen to replace it?

MS. SUMA: Objection, Your Honor. I don't believe he's entitled to any remuneration for loss of medical insurance, et cetera, under any of the Acts that he's still suing under.

THE COURT: Well, but I don't have any indication that he's qualified to answer that question.
BY MR. ZALECKI:
Q Let me ask you this, do you know what the cost replacement

insurance would have been?
A It would have been expensive, I'm sure.
Q That's okay. During your years at Chrysler, you filed various civil rights and handicap discrimination actions,

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which incidents?
A I was referring to all they had laid out when I lost my job. I said, "What do I do if it ain't true?"

He goes, "They said you broke the rules." And he says, "You broke the rules. That's the way it goes. You broke the rules, and just -- you know, we did what we had to do. We wrote a grievance."

I said, "But if it's not true, what am I supposed to do? I mean –"
Q For any of these suspensions, did the union ever fight for your right to prove that they never took place?

MS. SUMA: Objection, Your Honor. I'm not sure what relevance that has to the corporate liability. UAW is not a party here.

THE COURT: Counsel?
MR. ZALECKI: I'll withdraw that question.

THE COURT: All right.
BY MR. ZALECKI:
Q Can you estimate the amount of wages you lost for being off work due to this last suspension/termination in December of '96?
A Forty thousand dollars.
MR. ZALECKI: I have no further questions.

THE COURT: Cross-examine.
CROSS -EXAMINATION

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